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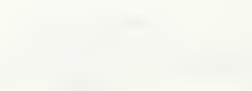
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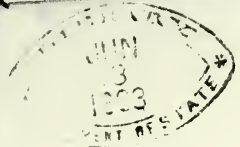
# THEORY

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GLEANINGS  
FROM THE  
JUDICIAL HISTORY  
OF  
RHODE ISLAND.

BY  
THOMAS DUFFEE. 17.6-1901.  
W

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*Crescit occulto rebus arbor æva.*

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PROVIDENCE  
SIDNEY S. RIDER, Act.  
1883.



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## GLEANINGS

FROM THE

JUDICIAL HISTORY OF RHODE ISLAND.

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THE first settlers of Rhode Island founded not a single State but four separate communities ; namely, Providence in 1636, Portsmouth in 1638, Newport in 1639, and Warwick in 1642. The Warwick settlers, guided by Gorton, believed they had no right to create a government for themselves, without the sanction of the Mother Country, and accordingly remained, until after the organization under the first charter in 1647, without government and of course without a judiciary. They probably had recourse in their private differences to arbitration ; but how they managed to repress crime and preserve the peace for five years is not easily conjectured. The





other settlers were too practical to entertain Gorton's scruple. They did not theorize; but, being owners of the soil by gift or purchase from the Indians, and recognizing the necessity of government, they established it by mutual agreement.

The Providence settlers agreed to be governed by "the major consent" of the freemen of the town, "only in civil things." They seem at first to have transacted their judicial as well as their other public business in town meeting. Thus it was in town meeting that Joshua Verin was tried, convicted and disfranchised for violating the right of soul-liberty in the person of his wife, in that he would not let her frequent the week-day religious services of Roger Williams. Of course such a system could only succeed in a small, primitive and uncontentious society, and unfortunately the loss of the early records of the town leaves it uncertain how the system succeeded in Providence. That it did not give universal satisfaction is inferable from the provision for compulsory arbitrations adopted in 1640, which, however, though it may have been a step towards



something better, can hardly be regarded as anything better in itself.

The Portsmouth settlers inclined at first to a sort of theocracy. They agreed to submit "their persons, lives and estates unto our Lord Jesus Christ, the King of Kings and Lord of Lords, and to all those perfect and most absolute laws of His, given in His Holy Word of Truth, to be guided and judged thereby." Following Judaic example, they chose a judge to exercise authority among them, his powers being left undefined, though they were evidently not understood to be exclusive even in judicature. The records show that seven months had scarcely elapsed before the infant town was scandalized by "a riot of drunkenness," committed by seven men, who were tried for their offence in town meeting and condemned severally, according to their guilt, to pay fines or to pay fines and sit in the stocks.\* The records also show that two months later the

\* The records show that a pair of stocks and a whipping post were ordered for Portsmouth in August, 1638, and that in December a house for a prison "containing twelve feet in length, ten feet in breadth, and ten feet stud," was directed to be built. For Newport a pair of stocks and a whipping post were ordered in December, 1639. Those infant towns were evidently not Arcadias.



freemen in town meeting made an order for the seizure of the house and goods of an absconding debtor to satisfy the claims of his creditors. Still later, but before the year was out, three elders were associated with the judge to assist him in administering justice and in drawing up such rules and laws as should be "according to God" and for the general welfare, with direction, nevertheless, to make quarterly report of their proceedings for revision in town meeting. Apparently the government during the first year was in an exceedingly tentative and unsettled condition.

At the commencement of the second year a part of the settlers, their number having greatly increased, migrated to the South end of the island, where they founded the town of Newport; while those who remained entered into a new compact of government in which, discarding the theocratic element, they acknowledged themselves the legal subjects of his Majesty, King Charles, and in his name engaged themselves "into a civil body politic unto his laws according to matters of justice." The offices of judge and elders, the elders being increased to seven, were continued, with a more distinct delegation of



judicial power and a provision for trial by jury in the weightier causes. There is nothing in the records,—which however are a good deal mutilated,—to show that recourse was ever afterwards had to the jurisprudence of a town meeting.

At Newport, during the first year of the settlement, the judicial power was confided to a judge with elders, the judge having a double vote, and, for anything that appears, was never exercised in town meeting. The second year the two towns, except in minor local matters, united in a common government, under which the chief magistracy was vested in a governor, a deputy governor and four assistants, the governor and two assistants to be chosen from one town and the deputy governor and two assistants from the other. The governor and assistants were made justices of the peace *ex-officio*. What jurisdiction this gave them does not appear, but probably the jurisdiction of justices of the peace in England. Courts, consisting of magistrates and jurors, were ordained, to be held every quarter, at Newport and Portsmouth alternately, with power to judge and determine all such cases and actions as







should be presented. It is not expressly stated in the records who were to act as magistrates, but undoubtedly they were the governor or deputy governor and assistants. The system thus created, continued, with occasional changes not affecting its character, until 1647, when the mainland united with the island towns under the first charter.

The intelligent reader will not fail to remark the surprisingly rapid development of juridical ideas in the two island towns. Within less than three years they advanced from that rude popular forum, a town meeting, undertaking to administer the law of Judea in an American wilderness, to a well organized judiciary, excellently suited to their wants and fully equipped for the dispensation of justice according to the methods and principles of the common law. Such a progress betokens the presence there of some man having not only a large legal and legislative capacity, but also a commanding influence to secure the adoption of his views. That such a man existed there is confirmed, if any confirmation be necessary, by that remarkable piece of colonial legislation, which had its origin on the island, the code of 1647.



Who was he? History gives no reply, ungratefully withholding from him his just meed of renown; for whoever he was, he was certainly, after Roger Williams and John Clarke, one of the principal benefactors of the infant colony.\*

The union of the four towns under the first charter and the enactment of the code of 1647 introduced a new judicial system. The chief officers of government under the first charter were a president and four assistants, one from each town. To them was committed the duty of holding, twice yearly, the General Court of Trials for the whole Colony—a court which was the predecessor of the present supreme court of the state. This court when first established had jurisdiction of the higher class of crimes; of cases between town and town; of cases between parties living in different towns; of cases against parties belonging to neighboring colonies,

\* Callender, in the dedication of his *Historical Discourse* to a grandson of William Coddington, says that Coddington assisted in framing the code, but does not claim the authorship for him. The code, however, has a homogeneity, as if, how many soever may have contributed to it, some one master mind had given it form and character. The question is, Whose was that mind? If it was Coddington's, then to Coddington, whatever his subsequent demerit, belongs the unforfeitable credit of it.



and generally of all important cases and of all matters of judicial cognizance, which were not referred to other tribunals. The other tribunals were the town or local courts. They retained jurisdiction of minor offences and of minor civil causes between parties living in the towns where they were held. The general court, at least after 1650, exercised an appellate or revisory jurisdiction over them. The system, however, did not give satisfaction; perhaps it aroused local jealousies; for in 1651 it was enacted that all causes, except prosecutions for certain crimes of the highest grade, should be tried in the first place in the town courts, the General Court being thus converted into a court of appeal or review. The system as thus modified remained in force, except as it was interrupted by Coddington's usurpation, until 1663, when the royal charter of Charles II was received.

In the preceding description one curious feature of the system has been omitted. The general court in holding its sessions had to make the circuit of the several towns; and in the code of 1647, it was enacted that in whatever town the court should be held,



the head officers of that town should sit with the judges for their counsel and help. Doubtless the object was to flatter local pride and appease a prevalent fear of centralization. So nugatory a concession, however, could but be unavailing. Magistrates who had no power to vote, but could only sit and confer, must have speedily discovered that they were superfluous. It therefore became necessary either to dispense with their services or to enlarge their powers; and accordingly, in 1650, an act was passed giving them "equal authority to vote and act with the general officers."

In those early days there were of course no court houses, and the judges, sitting in rude and ill-appointed rooms, were liable to, and doubtless did often, fall into lax and disorderly modes of proceeding. The authors of the code of 1647, appear to have been mindful of this ill-omened liability, and to have wished to counteract it. The code contains rules descending to particulars, which were professedly designed "to add to the comely and commendable order of the court." The court under one of these rules, suited to a generation of early





risers, was required to open daily when in session at eight o'clock in the morning "at the farthest." Another of these rules shows that then, as always since then in Rhode Island, a judge was severely condemned for stooping to the rôle of the advocate. This rule directs that the judge, in charging the jury, "shall mind the inquest of the most material passages and arguments that are brought by one and other for the case and against it, without alteration or leaning to one party or another, which is too commonly seen." Such enlightened solicitude not only for the impartiality, but also for the dignity of the bench, and for the decorous and orderly conduct of judicial proceedings, was certainly remarkable in a people who had but just set-up their habitations in the wilderness and who were still warring with the wolf and watching the wavering friendship of the savage. The list of the earlier judges includes, along with the names of many forgotten worthies, the historic names of Roger Williams, John Clarke, William Coddington and Samuel Gorton.

With the reception of the royal charter in 1663, the judiciary again suffered change. The charter



provided for the election of a governor, a deputy governor, ten assistants and a body of deputies, who, or a quorum of whom, when convened in general assembly, possessed full governmental powers. The functions of the deputies were purely legislative; those of the governor, deputy governor and assistants, magisterial as well. The charter did not create judicial tribunals, but empowered the general assembly to create them; and accordingly the general assembly at its first session under the charter, provided that either the governor or the deputy governor, with at least six assistants, should hold the general court of trials at Newport every year in May and October. The terms were soon afterwards altered to March and September, because it was found that the sessions of the court interfered with the sessions of the general assembly. The general assembly also provided for special courts for urgent occasions, and for a court for Providence and Warwick, "for the trial of any actional matter to the value of and under ten pounds, debt or damages," to be held by three assistants every six months alternately in Warwick and Providence.



The act constituting the superior court did not define its jurisdiction ; but as the charter continued in force all statutes, not repugnant to the laws of the realm, it may have been understood that the old system survived and that the court, as newly officered, was a continuation of the former court of the same name. This, however, is not clear ; for the old court held its sessions in all the towns, the new only at Newport ; and the town officers, who sat in the old, did not sit in the new. The old court became, as we have seen, mainly a court of appeals, whereas the new court appears to have exercised more original jurisdiction ; and the provision for a special court for Providence and Warwick seems somewhat inconsistent with an unbroken continuance of the old order of things. The reader, therefore, who tries to form a clear conception of the system, will probably not succeed. He will not be able to determine with certainty the jurisdiction of the several courts ; nor their relations to each other ; nor by what procedure causes were carried from the lower to the higher, and correction was transmitted from the higher to the lower tribunals. This is because of the meagreness



of the legislation. But let him not thence infer that the system was practically inefficacious. The judges who administered had helped enact it, and would be pretty sure to construe their enactments so as to make them effectual. As judges they could make rules, and, in shaping their jurisdiction and procedure, they doubtless took pattern of the higher English courts. Moreover it is to be borne in mind that the system, which is now a dead fossil only, was then a living branch of the government, and naturally gathered to itself, as a sort of parasitical accretion, the usages, customs, and traditions which were necessary, by way of either explanation or supplement, to uphold and perpetuate it.

At first the judges served without pay, except perhaps a few paltry fees. The result was that the court frequently had no quorum. The result was only too natural; but it was, nevertheless, a crying evil. To remedy it the General Assembly reduced the number of assistants necessary for a quorum to four, and later to three, and provided that each assistant should be paid three, soon afterwards four, shillings a day for attending court, and be fined twice as





much for being absent without good reason. This was the law for the judges when a quorum appeared, but when there was no quorum, the absentees were to be fined five pounds each. A preamble to the law explained that one reason for its enactment was that the persons concerned might "see themselves strongly obliged, partly through hope of reward in case of attendance, and partly through fear of penalty in case of neglect." It must be confessed that our worthy ancestors, in appealing to those master motives, were as parsimonious of reward as prodigal of punishment. The evil, however, seems to have yielded to the treatment, though, considering how formidable the journey from Providence or Warwick to Newport must often have been in the bitter March weather, with the modes of conveyance then in use, the wonder is that it did so.

The next important change occurred in 1729, when the colony was divided into three counties; namely, Newport, containing the islands of the bay, and Block Island, with Newport for the shire town; Providence, containing the old towns of Providence, Warwick, and East Greenwich, with Providence for



the shire town, and King's, containing the old towns of North Kingstown, South Kingstown, and Westerly, with South Kingstown for the shire town. The reason for the division was that, with the increase of population, the more remote inhabitants, particularly of the main-land, were "put to great trouble and difficulty in prosecuting their affairs in the common course of justice." For each county, accordingly, a criminal and a civil court were established. The criminal courts were denominated courts of general sessions of the peace, and were held twice a year in each county by the justices of the peace of the county, any five of them being a quorum. They had original jurisdiction, subject to appeal to the higher court, of all crimes not capital, and appellate jurisdiction of all such petty offences as were triable by justices of the peace. The civil courts, called courts of common pleas, were each held by "four judicious and skillful persons," chosen by the General Assembly from the counties in which they were to act, and commissioned by the governor to hold their offices



*Quamdiu se bene gesserint.*\* Their jurisdiction extended, subject to appeal to the higher court, to "all civil actions arising or happening within such county, triable at common law, of whatever nature, kind or quality soever." They held their sessions twice a year in each county. The higher court, which now received the name of "The Superior Court of Judicature, Court of Assize, and General Goal Delivery," continued to be held exclusively at Newport. Its jurisdiction in civil, and mainly in criminal matters, became purely appellate, but, under this limitation, was declared to be as ample as that of "The Court of Common Pleas, King's Bench, or Exchequer in His Majesty's Kingdom of England." The system as thus revised was complete, clearly defined, and doubtless well suited to the needs of the colony, except in two particulars.

The two particulars in which the new system fell short were, first, that the superior court continued to be held by the governor, or deputy governor, and

\*In 1733 this was altered, and the tenure limited, making the judges officers of annual appointment. The reason for the change given in the preamble of the act is that the tenure "is found very inconsistent with the constitution of this government, and contrary to the same."



the assistants; and second, that it continued to be held exclusively at Newport. The governor, the deputy governor, and the assistants, were political officers, chosen mainly for political reasons, who, if they happened to be qualified for judicial service, could not be counted on longer than they continued to represent the popular sentiment. The wonder is that a court so constituted should have retained public confidence for nearly a century. The business of the court, however, in those early days, was comparatively simple, demanding good common sense rather than profound learning, and therefore the evil resulting from the peculiar constitution of the court was for long not very seriously felt.

Some of the reasons which confined the superior court to Newport so long are not far to seek. Newport was the chief town of the colony in wealth, population and social influence. Though not central in location, it was easily accessible from all quarters by water; and this, in those times of unfacilitated travel, was no slight advantage. No other town equalled it in political importance. The citizens of no other town understood so well, or cultivated so





assiduously, the amenities of every day life. Its flourishing commerce put it more fully *en rapport*, than was any other town, with all that was best in the intellectual life of the old world. It therefore naturally remained the seat of the court while the court remained stationary. And happily for the colony at large, however unhappily for individual suitors, the court remained stationary for more than eighty years. The salutary influence of Newport on the early history of the state has never been fully appreciated. The population of the rest of the colony was singularly heterogeneous. The home of soul-liberty became not unnaturally the home of rampant individuality. Many men flocked to it to find freedom not only for troubled consciences but also for troublesome eccentricities. Adventurers came full of restless ardor, chafing at every restraint. Men with all sorts of hobbies and whimsies in religion and politics came to enjoy or propagate them. Men of licentious lives and vicious propensities came, driven out of their old haunts and seeking fresh fields for indulgence. Hence an immiscible medley of ill-assorted minds teeming with the feuds and follies of a reckless self-assertion.



Hence too a disintegrating growth of local as well as personal jealousies and dissensions. The great problem was to pacify and reconcile these jarring elements so as to bring them into the co-operant unity of a true state. In this important though inconspicuous work Newport played a prominent part. There was there a higher civic or communal sentiment, a more educated public spirit, a profounder political consciousness, resulting in a more habitual as well as a more intelligent reverence for law and government, than elsewhere in the colony. The best lawyers lived there. During all but fifteen of the first seventy-seven years under the second charter, the attorney generals were Newport men. The ablest politicians and public men lived there. During all but twenty-three of the first hundred years under the second charter the governors were Newport men. There the general assembly met annually for its most signal and indispensable business. The leading men of every part of the colony were thus continually introduced to a purer civic and political atmosphere and continually exposed to the influences of a more cultivated and homogeneous society. The result could



not be other than good. Men who came full of local prejudices or personal antipathies lost them in their contact with a more genial life by a sort of insensible evaporation. Men who came to champion the interest of a section or the cause of a clique found themselves gradually converted to broader views and juster sentiments. And the same influences which so prevailed with the general assembly, acted in like manner on the court, liberalizing the minds of judges, lawyers and litigants, and benefiting the judges especially by bringing them into familiar intercourse with the ablest jurists of the colony.

But whatever incidental advantages might thus temporarily accrue, the disadvantages were sure in the long run to outweigh them. As the docket of the court increased with the increase of population and business, these disadvantages grew more and more glaringly apparent. At last the need of change became too urgent for further delay, and accordingly, under an act passed in February, 1747, the change was accomplished. In lieu of the governor or deputy governor and the ten assistants there were to be five judges, a chief and four associates, (any three



being a quorum,) who were to be chosen annually by the general assembly, and commissioned by the governor, to hold the court; and provision was made for two sessions a year in every county throughout the state.\*

Later changes may be more summarily treated. In 1780 the general assembly discovered that it was incompatible with the constitution of the state for legislative and judicial powers to be united in the same person, and, so declaring by preamble, enacted that after the next election no member of either house of the assembly should fill the office of a justice of the supreme court. The act was probably drafted by some disciple of the political philosophy of Montesquieu, then recently promulgated; but, considering the judicial services rendered by the governor, deputy governor and assistants for more than eighty years, and the important judicial functions still habitually exercised by the general assembly, the wonder is that the assembly consented to such a

\*Bristol County had but just been created out of territory recovered from Massachusetts, and the County of Kent was created in 1750 out of territory set off from the County of Providence.





preamble. Apparently it did so in utter unconsciousness that it was itself the chief violator of the principle which it was proclaiming.\* The court continued to discharge its duties under the uncouth and lumbering appellation of "The Superior Court of Judicature, Court of Assize and General Goal Delivery" until 1798, when it received the name of "The Supreme Judicial Court," which it retained down to the adoption of the constitution in 1843, when, dropping "Judicial," it became "The Supreme Court." Under the old charter the judges were appointed annually; but under the constitution, after being appointed and at the annual election re-appointed, they hold for life unless they resign or are removed. In 1875 the number of the judges, which had been four since 1843, was increased to five.

Some of the enlargements or modifications of jurisdiction may be noted. In 1749 the superior court was authorized to grant divorces on due proof that either husband or wife had wickedly or

\*Judges of the court of common pleas were excluded from the general assembly by act passed in May, 1783.



wilfully violated the marriage covenant either by act committed or by desertion without just cause for seven years. A jurisdiction so vaguely defined must have been uncertain, varying with different judges according as they held strict or lax views. In 1798 the causes for divorce were more specifically enumerated, the statute being—contrary to the popular belief that the divorce law of the state has been greatly relaxed in recent times—almost identical with the present statute. Down to 1832 jurisdiction in insolvency was exercised by the general assembly, except for brief periods, independently of the courts. In 1832 it was conferred on the supreme judicial court with a right of appeal to the general assembly. Insolvent appeals continued to be taken until about 1857 when, under the decision in *Taylor vs. Place*, the provision authorizing them was abrogated.

The chancery powers of the court, now so important, were slowly acquired. The first grant, made in 1667, was simply a grant of power to proceed where any penalty, conditional estate or equity of redemption was sued for, according to



rules of equity and to chancerize forfeitures. In 1798 the court was empowered to entertain a bill to redeem, and in 1822 a bill for foreclosure. At the latter date likewise jurisdiction on appeal from town councils was granted over property held for charitable uses. In 1829 jurisdiction was extended to all cases relating to trusts created by assignment for the benefit of creditors; in 1836 to cases relating to trusts however created; to controversies between copartners; to proceedings against banks for forfeiture of charter and for liquidation, and, in 1837, against railroad and turnpike corporations to restrain them from violating their charters. In 1841 the court was vested with full equity powers in cases of fraud. These successive grants indicate a growing sense of the need of the more plastic powers of chancery to deal with the increasing complications of business, and at the same time betray a certain wariness in conceding them. The fact is the need had long existed; but, Rhode Island being a small state wedged in between Massachusetts and Connecticut, it was easy for any citizen wishing to bring suit in equity, to effect a change of citizenship and sue in



the circuit court. This was constantly done, Judge Story who presided in the circuit court being a favorite judge. Moreover the need was further met to some extent by the general assembly itself, which John Whipple in his exaggerative way once pronounced "the best court of chancery in the world." And so, with the popular liking for the common law and trial by jury, and the popular distrust of equity with its unfamiliar procedure, the giving of full chancery powers was continually deferred. But in 1843 the constitution, curtailing the powers of the general assembly, was adopted, and in the revision of the statutes which followed thereupon, the supreme court was invested with the complete equity jurisdiction which it has ever since enjoyed.

It has been stated that the civil common law jurisdiction of the higher court was mostly appellate or revisory. It continued so until 1847, when the supreme court was vested with original jurisdiction, concurrently with the court of common pleas, of all civil suits for one hundred dollars and upwards. This jurisdiction it still retains except that





now in Providence county the amount sued for must be at least three hundred dollars. The act conferring the jurisdiction provided that the party against whom verdict was rendered should have a second trial as of course, by moving for it in writing within forty-eight hours and paying the fee fixed for the entry of appeals. The purpose was to put actions commenced in the supreme court on a par with actions commenced in the court of common pleas, in which a party after verdict against him could get a second trial by appeal. The frequent effect was to make the first trial merely a preparation for the second; or if the first was full, to make the second a more desperate fight for victory. The right, which in spite of the obvious objections to it was highly prized by the bar, was abolished in 1878. The abolition was an undeniable improvement, but a great innovation on ancient usages; for in earlier times the law allowed not only two but often three jury trials; to wit, first in the court of common pleas; second on appeal in the supreme court; and third, if the two verdicts were contradictory, one trial more in review to determine which was right. The trial



in review was first given in 1732 and was not abolished until 1844.

In 1852 a very great and useful change was effected. - Previously the court sat in banc for almost all purposes. The act of 1852 made one justice a quorum for many purposes, including jury trials, and was soon amended so as to authorize the holding of the court by different justices at the same time in different places in the same or different counties.\* Without this law, which except for a brief period has since remained in force, the court could not possibly have kept up with its increasing business.

So much for the jurisdiction of the higher court, only some of the outlines, not the minutiae of which have been presented. The reader may be curious to know what compensation the judges received from time to time for their services. The curiosity is legitimate, but its gratification does not make a proud page in the history of the state. It should, however, be remembered with due allowance that

\* In January, 1841, one judge had been empowered to hold jury trials in civil causes in the County of Providence, but the power was not continued in the Digest of 1844.



fifty or a hundred years or more ago a dollar had a very different purchasing power from what it has to-day ; that then the domestic and social habits of all classes were far simpler and less luxurious ; that the state was then poor and its servants of all sorts were paid poorly or not at all, and finally that the duties of the bench then required not only less time, but also less thought and knowledge of law. But, even with all these allowances, it will have to be acknowledged that formerly the state was not liberal to its judges.

From the earliest times until quite recently the judges were paid in part by fees. The receipts from this source undoubtedly varied from time to time, but they can never have been large and must often have been quite inconsiderable. At first the judges were paid a per diem for actual service, the rate as already stated being first three and then four shillings a day. It is not certain how long this pit-tance continued to be paid, for the act allowing it does not reappear in the digests.\* The writer,

\*But in May, 1679, an act professedly to encourage the judges to attend court was passed, providing that their charges for diet and lodging while attending should be paid out of fines and forfeitures due the state. This seems to imply that they had no other allowance out of which the charges could be paid.



however, does not find any repeal or alteration until 1778, when a per diem of thirty-six shillings, increased the next year to 3*l*, was allowed to each judge. In 1780 the per diem was fixed at \$3.00 for the chief and  $\$2.\frac{50}{100}$  for each associate. In 1783 the per diem was changed to an annual salary of 30*l*. for the chief and 24*l*. for each associate. In 1786 the salaries were abolished and the judges left to the mercy of the general assembly. In 1793 a per diem of fifteen shillings was allowed to the chief and twelve shillings to each associate. In 1798 the salary of the chief was fixed at \$500, and that of each associate at \$350 per annum. In 1822 the salaries were reduced, the chief's to \$250 and the associates' to \$200 each. Some of these extraordinary changes occurred in paper money times, and may possibly be accounted for by fluctuations of the currency;\* others seem to have been purely

Annual salaries, however, were paid to the deputy governor and the assistants, which in 1722 amounted to 30*l* for the deputy governor, and 10*l* for each assistant. These salaries may have been intended to pay for judicial as well as other services.

\*In November, 1780, the treasurer was directed to pay the judges at the rate of \$72 in paper for each \$1 allowed.





capricious. The reduction in 1822 is inexplicable. In 1827 the number of the judges was reduced to three and their salaries raised to \$650 for the chief and \$550 for each associate. In 1848 Richard Ward Greene, a leader of the bar, was elected chief justice and the salary of the chief was raised to \$900. In 1854 Chief Justice Greene retired, and the salaries were changed to \$1,600 for the chief and \$1,500 for each associate, and the entries previously paid to the justices were turned into the treasury of the state. In 1856 Samuel Ames was appointed chief justice with a salary of \$2,500, and reporter with a salary of \$500. In 1857 the salaries of the associate justices were raised to \$1,800 each. In 1866 Charles Smith Bradley was elected chief justice with a salary of \$3,500. In 1868 he resigned, and the salaries were fixed at \$3,000 for the chief and \$2,500 for each associate. Since 1875 they have been \$4,500 for the chief and \$4,000 for each associate. And now any judge, after a continuous service of twenty-five years, or, if he be over seventy years of age, of ten years, is entitled to retire on full salary.



A few words in regard to the lower courts. The courts of general sessions of the peace and the courts of common pleas were nominally distinct tribunals, but manifestly they were held generally by the same persons. This is manifest because they were held at the same times and places in the different counties, the same clerks and apparently the same jurors answering for both, and they could easily be converted into one another; for, whereas the courts of general sessions were held by justices of the peace, five being a quorum, the courts of common pleas consisted of five judges—the fifth having been added in 1737,—who were made by statute justices of the peace of their respective counties in criminal cases and commissioned accordingly. The courts of general sessions continued to exist in this manner as separate courts until January, 1838, when they were abolished and their powers conferred on the courts of common pleas. In June, 1843, the courts of common pleas were reorganized so as to be severally held by a justice of the supreme court as chief justice with two associates chosen annually by the general assembly from the different counties.



The two associates were dispensed with in 1848. Since 1844 the supreme court and court of common pleas have exercised concurrent jurisdiction to a great extent in criminal matters.\* In petty causes, civil and criminal, justices of the peace and justice courts have from the earliest times exercised an original jurisdiction subject to appeal.

The town councils of the several towns were from the first courts of probate. It is true the code of 1647 commits the probate of wills not to the town councils but to the head officers of the towns, but it commits to the town councils a still more important function. The doctrine of the code is that it is not only the right but also the duty of men having property to dispose of it by will. If the property-owner, neglectful of this duty, dies intestate, the code devolves the duty on the town council of his town. Judge Staples, in a note to the code, states that "it was not an unusual thing, at least in Providence and Warwick, for the town councils to draw a paper in

\* In Providence County since 1878 the court of common pleas has had exclusive original jurisdiction in criminal causes, the supreme court having jurisdiction only on petitions for new trials and bills of exceptions.



the form of a will, reciting in it the intestacy of the deceased, and disposing of his estate among his heirs, apparently at their discretion. To the instruments thus drawn up," he says, "the members of the councils severally set their hands 'and put wax'. They were not simply distributions among the heirs, but in Providence one such will disposed of part of the real and personal estate to the widow, part for life and part in fee, and divided the residue among the children as tenants in tail general, with cross remainders." In 1663 the probate jurisdiction was fully committed to the town councils subject to appeal to the senate or governor and council as "supreme ordinary or judge of probates." This appellate jurisdiction continued in the senate until 1822, when it was transferred to the supreme judicial court, which or its successor, the supreme court, has since exercised it. The fact that the town councils of the several towns, except a few towns where special courts have been established, have satisfactorily discharged these important duties for more than two centuries testifies strongly in their favor. Doubtless a critical inspection of records would discover





numerous flaws and defects, but the jurisdiction has always been exercised not only with substantial justice, but also in a kindly, helpful, neighborly spirit which has disarmed criticism.

Besides these courts there were in the old colonial and revolutionary times, admiralty or maritime courts for the trial of prize and other maritime causes. The records of those courts yield a rich fund of fact for the history of privateering. It is not necessary, however, to do more than to mention them; for they very slightly, or at least only temporarily, concern the judicial history of the state. It remains to give some account of the exercise of judicial powers by the general assembly under the royal charter.

Originally the general assembly seems to have considered itself a court as well as a legislature, and in its proceedings it often denominated itself a court. As a court, however, its action, though in some sense judicial, was not so purely so as that of ordinary tribunals, but was often tempered by some admixture of legislation. In fact the assembly was very frequently petitioned (not to enforce but) to



modify the law in the particular case, or make it specially for the case, or to remedy some defect in it, or to help the petitioner get over the legal consequences of some mistake or omission of his own. It thus sat as a court to dispense justice not according to law but according to equity and according to equity in the popular as distinguished from the juridical meaning of the word. The records are full of illustrations of the jurisdiction. Thus the assembly early begun and long continued to grant divorces. In 1665 it granted a divorce for the adultery of the wife on her confession, and at the same time sentenced her to pay a fine and be whipped. In 1667 a husband and wife joined in petitioning for divorce. The assembly could find no good cause for divorce, but authorized them to live apart. In 1667 John Belew petitioned to be divorced from his wife, and the assembly, finding that from the first they had "lived very discontentedly, she complaining of his insufficiency," granted the petition. Sometimes the assembly granted alimony as well as divorce, or, in case of desertion by the husband, sequestered his estate for the support of the wife



and children without a divorce. Just but despotic! Of course after power to divorce was granted to the superior court, the jurisdiction languished, but it continued, nevertheless, to be invoked in exceptional cases, which either were not provided for by the statute or were too flimsy or too whimsical for judicial treatment. There is an uncanny tradition, still vaguely surviving, that in such cases grave legislators were sometimes plied in the lobby with solicitations and arguments too peculiar for public discussion. After the constitution the more usual course for the assembly was, not to hear the petition, but to authorize the supreme court to hear it by special act, if without such act the court was incompetent. Divorces, however, were granted as late as 1850. In January, 1851, the assembly had several petitions pending before it and transferred them, together with all documents and depositions in support of them, to the supreme court, "where," the resolution of transfer tartly remarks, "the said petitions should have been filed," and at the same time authorized and required the court to try them.

Another phase of the jurisdiction is exemplified



in the matter of appeals and petitions for new trial. The right of appeal was granted in 1680 in favor of any party to any "actional case" aggrieved by any judgment rendered in the higher court. The appeal seems to have taken the case up for re-trial on all the issues, though there was probably a good deal of arbitrariness in the procedure, the assembly acting as triers of both law and fact. At the conclusion of the hearing the judgment of the court below was either confirmed or modified, or, to borrow the contemporary euphemism, "chancerized" by mitigating the damages, or entirely reversed. In 1712, appeals to the assembly, technically so called, were abolished, though under another form, namely, by way of petition, the jurisdiction continued. In 1741 "a court of equity" was established to exercise these anomalous powers. Two years later, the act creating this court was repealed, experience showing that the trial of causes in it was a great grievance to the citizens, and, in lieu of an appeal, a review was allowed in the superior court in favor of any person aggrieved, who, either in that or the inferior court, had once obtained judgment.





In the trial of appeals the two houses sat together in grand committee. Of course, the lawyers in the assembly were pretty sure to take an active and sometimes possibly an over-zealous part. They incurred suspicion and ill-will. In 1729 an act was passed forbidding the election of "any practitioner of the law" as deputy while in practice, the reason assigned in the preamble being that the sitting of lawyers in the hearing of appeals was "found to be of ill consequence." The act, however, was not a success. It was repealed at the next session, and since then, though sometimes proposed, has never been reënacted.

The legislation in regard to the right of appeal did not affect petitions for trial or new trial. In granting such petitions, the general assembly assumed a large discretion, which it continued to exercise without question down to the adoption of the constitution, and for several years afterwards. The usual grounds for such petitions were mistake, accident, surprise, or newly-discovered testimony; but the assembly did not limit itself to such grounds. It granted new trials for any cause, including even



errors of law committed by the court. It would be presumptuous to say that the jurisdiction was not for the time salutary ; but it was evidently liable to great abuses. For instance, it is scarcely conceivable that a case between a member of the assembly and one who was not would be impartially decided. So, too, in a case between a man of great political power or influence and a man without it, the latter would surely be at an incalculable disadvantage. And the danger was always inevitable that a case which involved large interests or excited strong feelings would get embroiled with party politics and become a potent influence in the elections.

The superior court sometimes hesitated to yield to the assembly. The case of *Randall vs. Robinson* is an example of this. John Randall sued Matthew Robinson, the Tory lawyer, in the court of common pleas for Washington county, in trover for the conversion of his slave-woman Esther. Robinson pleaded not guilty and the jury found a verdict in his favor. A new trial being had, the jury found a special verdict to the effect that Esther had been the slave of Susannah Hazard, who, by will, dated April 27,



1767, had emancipated her ; that the executor, nevertheless, had sold her by bill of sale, dated June 5, 1768, and that after the sale, to wit, October 19, 1768, the bond required to secure the town from becoming chargeable for her, which was necessary to perfect the emancipation, was given. The jury, finding these facts, found further, if the court was of opinion that Esther was freed according to law, for the defendant for his costs, and if not, for the plaintiff eighty Spanish milled dollars, being her value, with costs. Apparently the question for the court was, whether Esther was free under the will or had failed of her freedom by the delay to give bond until after she was sold. The court of common pleas decided against her and gave the plaintiff judgment on the verdict. Both parties took an appeal to the superior court, the plaintiff expecting a new jury trial there, being probably dissatisfied with the damages he had recovered. But the superior court, regarding the special verdict as final, refused to let the case go to the jury again, and, reversing the decision of the court below, gave the defendant judgment for costs. In this it doubtless erred ; since an appeal brings a



case up for trial *de novo*. It seems to have been led astray by its knowledge that there was no real dispute about the facts, and that to let the jury try the case again would only be to let them, instead of the court, determine the question of law involved in it. The decision, though formally wrong, was doubtless substantially right. The plaintiff, who had refused to argue the special verdict and had protested against the action of the court as unconstitutional and contrary to common right, promptly petitioned the assembly for a new trial, characterizing the judgment against him as unprecedented and subversive of the right of trial by jury, and appealing to the wisdom and firmness of the assembly to defend its own law and the imperilled privileges of the people. The petition was preferred at a time when the public mind, all aglow with the animated debate that preceded the revolution, was quick to take fire at the slightest suggestion of danger to the right of jury trial. It was therefore very shrewd in the plaintiff to identify his cause with the patriot cause, and the more so that the defendant was a prominent loyalist. The assembly granted the petition. The jury





then found for the plaintiff for 58*l.* and costs. The court instantly set the verdict aside. At the next term the defendant again moved for judgment on the special verdict, and the court after calling on the plaintiff to argue said verdict, which the plaintiff declined to do, rendered judgment thereon for the defendant. The plaintiff petitioned the assembly to set the judgment aside and either give him judgment on his last verdict or grant him a new jury trial. The assembly granted him a new jury trial. He recovered a verdict at this trial for 35*l.* and costs. The court set it aside on the defendant's motion, as against law and evidence and ordered a new trial. The plaintiff again petitioned the assembly for relief and the assembly thereupon directed judgment for damages and costs according to the verdict last recovered.

The history of this case shows how utterly powerless the judiciary was, under the charter, in any conflict with the legislature, and of course illustrates the danger attending the exercise of judicial power by the legislative branch of the government. It shows, too, the immense popularity of trial by jury; for it



is manifest that the object of the assembly was not so much to protect John Randall from wrong as to guard the right of jury trial from judicial encroachment. There seems to have been a feeling, then more or less prevalent, that the jury not only had, but was entitled to have, a large discretion in matters of law as well as of fact in both civil and criminal cases. This feeling was confidently appealed to by John Randall in his petitions. In one of them he condemns the action of the court in setting aside the verdicts in his favor as a "great grievance, as," he says, "he conceives that jurors are judges of both law and fact, and as, for the same reason, every verdict given by a jury contrary to the opinion of the court may be set aside, which must annihilate every idea of trial by jury." The feeling was encouraged by the habitual neglect of the court to charge the jury, though there is no reason to think that it was ever recognized as legitimate by either the bench or the bar. It seems to have been loosely propagated by the patriots of ante-revolutionary times from an idea that their rights were safer with jurors than with judges—as indeed they may have been safer with jurors than with the royal judges of other colo-



nies—and unfortunately, having once gained admittance to the popular mind, it long lingered there, doing much harm, especially by retarding judicial reform.

A frequent result of appeal or petition was a reference by consent of parties of all matters in dispute between them to arbitration under a rule of the assembly similar to a rule of court. It merits remark that our court records show that arbitration was more resorted to as a remedy in ancient than in modern times. The cause of it is matter of conjecture, but probably it was because the earlier courts were less competent to deal with delicate or difficult questions of either law or fact. It may be noted, however, that an award, given by arbitration under a rule of court, was no safer than a judgment from the supervisory jurisdiction of the general assembly.

The assembly also exercised a jurisdiction, neither appellate nor revisory, which was exceedingly heterogeneous. Thus it was accustomed to authorize guardians, executors and administrators to sell real estate for the change of investment or the payment of debts. In one case it allowed a Connecticut widow and executrix to sell the real estate of her



late husband and testator in Rhode Island for the payment of his debts and to account for the proceeds with the Connecticut court of probate. It authorized or ratified partitions among tenants in common, if any of them were infants or otherwise incompetent, or it extinguished troublesome entailments. In one case it enforced or approved the specific performance of a contract for the sale of real estate which otherwise would have miscarried by reason of the premature death of the vendor. In another case it annulled a conveyance without consideration improvidently made. In another case one Caleb Fuller represents that he is the owner of the ferry between Providence and Rehoboth, subject to a half interest in his mother for life; that his mother has leased her half to Oliver Fuller, who presumes to improve the whole in disregard of his right, although it has been customary to improve it, week and week by turns, and he prays that the ancient order may be re-established, and that for breach thereof the same penalty may be prescribed as for a ferry without license. The prayer for relief was granted. So the assembly corrected judicial mistakes, chancerized or directed the chancerization of bonds, arrested legal





proceedings, or issued its mandates to the courts directing or prohibiting their action. To some extent, doubtless, the jurisdiction still exists; but no modern legislature, independently even of constitutional restrictions, would attempt the habitual exercise of powers so delicate, various, arbitrary and indeterminate.

Occasionally a case occurs which has a touch of romance in it, or which illuminates an extinct phase or usage of society. The petition of Amey Allen, preferred in 1784, shows that Amey, when an infant, was abandoned by unnatural parents to the nursing and care of a slave-woman, who, with the connivance of those about her, feigned to be her mother; that she was thus degraded to be the companion of slaves, and to be bought and sold as such; that later she had been more considerately treated and allowed her freedom, but that to her surprise, a few weeks before, she had been taken by a creditor of her supposed master on execution and was in danger of being sold to satisfy it; and it therefore prays the assembly for relief. The assembly, promptly assuming jurisdiction, decided after inquiry that she was white



and consequently free, and thereupon passed an act restoring her "to all the rights and privileges belonging to the natural free-born citizen of this state."

The jurisdiction presents still other phases. The primitive assembly sometimes acted as *censor morum* to "admonish" an erring citizen, or as peace-maker to reconcile dissentient neighbors. Thus we read that when William Coddington and William Dyre, the widower of Mary, the martyred Quakeress, who had been respectively the first chief magistrate and the first town clerk of Newport, got into a lawsuit about "killing a mare," and the case came before the assembly, the assembly tried to persuade them "to a loving composure," but unhappily without success. The assembly was exceedingly sensitive to criticism and exceedingly resentful of any impugment of its authority. And Dyre, in his litigation with Coddington, having offensively reflected on it, was forthwith compelled to confess his fault and beg forgiveness.

In 1667, William Harris, who was the political Ishmaelite of his day, preferred against Arthur Fennel a charge of making a "rout" in the town of



Providence and procured a session of the assembly in July purposely to try it. The assembly, having found the charge to be false, and being offended with Harris, not only because of his generally turbulent behavior, but also because he had got it convened without good reason at a "busie time of the yeare," and justified himself by "pretending to question its proceedings," mulcted him in a fine of 50*l.* to defray the cost of the session, and ignominiously dismissed him from his office of assistant. A year later, however, the fine was rescinded on legal advice as contrary to the law of the realm.

In 1717, Gabriel Bernon, the excellent but impulsive old Huguenot, for making false and slanderous charges against an assistant and for behaving contemptuously to the assembly, was compelled to profess sorrow and beg the pardon not only of the assembly but also of the assistant. In 1727, one Hardman, who had published a pamphlet containing "vile and mutinous expressions," was forced to apologize, and his pamphlet was publicly burnt in front of the colony house. In 1753, John Martin, for "abusing" the assembly, was incarcerated until he begged



pardon. In 1756, Samuel Thayer, who was arraigned before the assembly for grossly abusing it, confessed that he had "damned it," and was imprisoned. In 1781, Matthew Robinson, the Narragansett lawyer, was committed to King's county jail by the assembly until further order, because the assembly had been informed that he had in his conduct and conversation manifested principles inimical and dangerous to the liberties of the United States.

One of the most curious exertions of the power concerned not the living but the dead. In 1707, a negro slave, who had shortly before committed "a horrid and barbarous murder" on the wife of his master, was found dead on the shore of Little Compton, having, it was supposed, jumped into the sea and drowned himself to avoid being taken alive. His body having been brought into the harbor of Newport, while the assembly was in session there, the assembly ordered his head, legs and arms to be cut off and hung up in some public place, near the town, and the rest of his body to be burnt to ashes, "that it may, if it please God, be something a terror to others from perpetrating the like barbarity for the





future." In some of these cases the assembly seems to have undertaken the function, now performed by the public press, of giving voice to popular indignation, and of visiting with condign censure and reprobation misbehavior which would otherwise have received no punishment.

Of course the assembly, in the exercise of its pardoning power, mitigated or commuted sentences at pleasure: sometimes it went further and utterly abrogated them. The case of Simeon Potter is a notable example of this. Simeon Potter was a Bristol man, one of the founders of the great DeWolf fortunes. He was a mariner of the old Viking breed, who gained wealth and renown in privateering. He commanded the "Prince Charles of Loraine" in its freebooting descent on the coast of Oyapoe. About 1750 he retired from the sea and came to live in Bristol. In 1752 and frequently afterward, he represented the town in the general assembly. The old Berserker and marauding spirit, however, had not exhausted itself on the ocean, but still survived under other forms. He walked the streets of the ancient seaport, as he had walked his quarter-deck, with blunt and



impetuous self-assertion. The Bristol court records through many years abound in suits to which he was a party. In 1761 he violently assaulted the Reverend John Usher, an Episcopal clergyman of Bristol. He was indicted, tried, convicted and sentenced to pay a fine of 500*l*. He sought relief in the general assembly, representing (probably without much truth) that the grand jury had been coerced by the court and the king's attorney, and that, when his trial came on before the petit jury, he was hardly dealt with by the sheriff, who took up talesmen who were prejudiced by clamor and had prejudged the cause. He prayed to have the indictment, conviction, sentence and record annulled and rendered absolutely void. His prayer was granted. The case affords a perfect precedent for the action of the assembly, nearly a century afterwards, in regard to the conviction and sentence of Thomas W. Dorr, except the order in the Dorr case for cancelling the record. The record in the case of Simeon Potter remains inviolate to this day.

One of the famous passages in the judicial history of Rhode Island, involving action by the general



assembly, is that relating to the case of *Trevett vs. Weeden*. The case was a *qui tam* information under an act designed to give efficacy to the paper money of the State. Under the act any person refusing the money in payment of any article exposed for sale by him, was rendered liable to a forfeiture of thirty pounds, and to be prosecuted to summary conviction therefor before a special court composed of three superior court judges, sitting without a jury. The act went into effect in June, 1786, and in the following September the information was filed alleging that Weeden had refused the money for meat exposed for sale by him in open market. The case was removed into the superior court which was then in session. It was tried on three pleas to the jurisdiction, one of which set up that the act was unconstitutional and void because it authorized a trial by court without jury. It was argued for the defence by Henry Marchant and James Mitchell Varnum,—by the latter with splendid eloquence. The information was dismissed by the court as not within its cognizance. Of course the trial made an immense sensation: The general assembly met in October and immediately summoned



the judges before them to declare the grounds of their decision. The doctrine, now so familiar, that it is within the power of a court to declare a statute void for unconstitutionality, was then entirely novel. The astonishment which it created reflects itself in the vote of the assembly, the preamble of which, after setting forth that the court had "adjudged an act of the supreme legislature of this state to be unconstitutional and so absolutely void," goes on to say that "it is suggested that the aforesaid judgment is unprecedented in this state and may tend to abolish the legislative authority thereof." Three of the judges, to wit, Joseph Hazard, Thomas Tillinghast and David Howell appeared before the assembly in obedience to the summons. They chose Howell, the youngest of their number, but an accomplished jurist and by far the ablest judge in the state, to speak for them.

The speech is said to have lasted six hours. The first proposition was, that the right of trial by jury is a constitutional or fundamental right, and cannot be taken away from the citizen even by an act of the legislature. The argument of Judge Howell in support of this proposition has not come down to us, but





it was probably the same as that adduced by Var-num, of which we have a report. If it was the same, then it was in effect briefly this: First, That the charter did not grant unlimited legislative power, but only power to enact such laws as were not repugnant to the laws of the realm, and that under this restraint the general assembly, even after the colony had become independent, had no power to enact a law which was repugnant to those great and immemorial rules, maxims and principles of Magna Charta and the common law, which were the birth-right of every American as well as of every Englishman. Second, That the assembly had no power to take the right away, independently of any limitation of the charter, because every grant of legislative power is subject to a condition implied in it, that there are certain great laws or institutions, ante-dating the grant and paramount to it, which, being themselves the permanent ground-work of legislation, limit the power of the legislature, and that among these great constitutional laws or institutions, in England and America, is the right of trial by jury. The argument, which was fortified by abundant quotation from jurists



and commentators, is certainly powerful; but it is doubtful if it can have convinced any one among its hearers who maintained—as many did then and subsequently maintain—that after the revolution, the general assembly of Rhode Island was as omnipotent as the parliament of England.

The second proposition was that the judges were not accountable to the legislature for the reasons of their judgment. Judge Howell, assuming that to call for their reasons was virtually to assert the right to direct their judgments, argued with great fullness of illustration and authority, that the judges were not amenable to the call, because they were obliged by the very nature of their functions and by their oath of office, to decide according to reasons which were convincing to themselves, since the act of judging is the assent of the mind after deliberation, decision without such assent being perjury. He maintained that if they were amenable to the assembly at all, they were amenable, not for deciding according to their convictions, but for deciding from either fear or favor against them, and that, as there was no charge that they had so decided, they should be excused from further attendance.



The assembly, after listening to the speech and to brief remarks by the other judges, proceeded to consider "whether the assembly was satisfied with the reasons given by the judges in support of their judgment." This question was quickly decided in the negative. Then came a motion to dismiss the judges from their offices. "Candidates were ready upon the spot," says Varnum in his spirited account of the case, "to fill the seats thus to be made vacant." Fortunately for the assembly, before it could come to a vote on this momentous motion, it was confronted by a memorial from the judges, in which they claimed that they had the right, before dismissal, to be heard, in answer to certain and specific charges, before some proper and legal tribunal. General Varnum was permitted to address the assembly in support of the memorial. He argued that the judges, having been elected for the year, were entitled to their offices until the close of the year unless they had forfeited them by misbehavior, and that they could not be adjudged to have so forfeited them without a hearing before some competent tribunal, the assembly being disqualified to sit in judgment because it was



already acting as prosecutor. The address was eloquent and impressive. It forced the assembly to pause, reflect and listen to wiser counsels. A more moderate temper ensued, and finally the majority voted "that as the judges are not charged with any criminality in rendering the judgment upon information, Trevett against Weeden, they are therefore discharged from any further attendance upon this assembly on that account."

The assembly, however, though baffled and disappointed for the moment, was not wholly defeated. It waited sullenly for its revenge, and when the new year came round elected new officers in the places of those who had so resolutely resisted it. The people had failed to respond to the lofty mood of the judges, and it almost seemed as if the triumph of the judges had terminated in disaster. But nevertheless the substantial victory was with them; for, in the first place, their decision in the case of *Trevett vs. Weeden* resulted a few months later in a repeal of the discredited statute, thus alleviating though it could not wholly abate the evils of a fatuous and fanatical financial policy; and, in the second place, their high





behavior, their steadiness, their magnanimity, in the presence of an irate and inimical assembly, not only achieved for them a temporary *eclat*, but lent a lasting lustre to their cause, so that thenceforth the independence of the judiciary became, notwithstanding the judges continued long to be annually elected, one of the grand traditions of the state, carrying with it the authority almost of constitutional law.

It is not possible to say by what specious show of reason the general assembly was originally led to suppose it had the large judicial powers which it was accustomed to exercise. The charter does not confer them, nor—at least in civil cases—afford any color for the claim of them. It seems almost as if the assembly began by calling itself a court, and then, assuming that it was what it called itself, arrogated the plenary powers of a judicial tribunal. That it did not usurp these powers with entire freedom from misgiving is manifest; for in 1678 it refused to interfere with a judgment of the general court of trials in a civil cause, declaring that "this assembly conceive that it doth not properly belong to them, or anywise within their recognizance, to judge or to reverse any



sentence or judgment passed by the general court of trials according to law, except capital or criminal cases, or mulct or fines." Nevertheless in 1680 the assembly passed the act which constituted it the high court of appeals for the colony. In 1699 the Earl of Bellomont, under instructions to inquire and report concerning the conduct of the colony of Rhode Island in various matters, made report to the Lords of Trade and Plantations, that "the general assembly assume a judicial power of hearing, trying and determining civil cases, removing them out of the ordinary courts of justice, and way of trial according to the course of the common law, alter and reverse verdicts and judgments—the charter committing no judicial power or authority unto them." Of course the general assembly must have been fully advised of the report; yet in 1705 it enacted, prefacing the act with a semi-apologetic preamble, that "the general assembly, at all times convened in general assembly, shall be a court of chancery, as formerly it hath been, until such time as a more proper court may be conveniently erected and settled." In 1708, in the case of *Brenton vs. Remington* on appeal, it reversed the



judgment of the court below, and permitted a mortgagor to redeem after the lapse of more than twenty years. The case was carried to the Queen in council, where in 1710 the judgment of the assembly was declared void for want of jurisdiction, with an order to the magistrates for the time being to take notice and govern themselves accordingly. Consequently the assembly in 1712, after having seriously considered the decision and its own authority, came to the conclusion that it had no power to constitute itself a court of chancery "by reason," as it rather naively declared, "that we cannot find any precedent that the legislators or parliament of England, after they had passed an act or law, took upon themselves the executive power or authority of constituting themselves a court of chancery or any other court of judicature." Accordingly it repealed the act by which it had constituted itself a court of chancery or appeals, and thereupon, apparently unconscious of any inconsistency between its confession and its conduct, continued to exercise its jurisdiction, both original and revisory, by way of petition, except for a short time from 1741 to 1743, as vigorously as ever.



After the Revolution there was no power to dispute the jurisdiction, and the assembly continued to exercise it without question. The evils incident to it must have been patent to all thoughtful minds, and yet, in the convention which framed the constitution, there was no serious discussion of them. The provision that "the judicial power of this state shall be vested in one supreme court and in such inferior courts as the general assembly may from time to time ordain and establish," was copied from the constitution of the United States, and adopted without any real debate. Along with it, but under a different head, was inserted the provision that "the general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution," and, for several years it seems to have been generally taken for granted that, either under or independently of this provision, the judicial powers of the assembly still survived. There was no interruption of the jurisdiction in the matter of insolvent appeals; and petitions for new trial continued to be entertained as usual without question. In January, 1854, however, a bill was introduced into





the assembly for an act reversing and annulling the sentence of Thomas W. Dorr for treason, and directing the clerk of the supreme court to write across the record of the judgment the words, "Reversed and annulled by order of the General Assembly, at their January session, A. D. 1854." The bill, though stoutly resisted on constitutional grounds, was hurried hotly through the two houses of the assembly under the party whip, the democrats being in a majority. The next year, the assembly being no longer democratic, a resolution passed calling on the judges of the supreme court for their opinion upon the constitutionality of the act. The opinion of the judges was that the act was unconstitutional. The judges take the ground, in clear and cogent language, that the constitution, by making the familiar distribution of powers, and by vesting "the judicial power" in the supreme and inferior courts, gives the judicial power exclusively to the courts, and so, by implication, denies it to the general assembly. In regard to the section continuing to the assembly the powers previously exercised by it, unless prohibited, they remark that the section occurs in the grant of legis-



lative power and presumably therefore contemplates only such power, and they further declare that the section does not cover judicial powers, because the exercise of them is prohibited to the assembly,—the prohibition by implication being as effectual as if it were expressed. But by a singular paralogism, after going thus far, the judges, from deference to contemporaneous construction and for the security of titles, concede to the assembly such judicial powers as it had habitually exercised, both immediately before and immediately after the adoption of the constitution, though they do not find among them any power to pass the act in question. The opinion, therefore, while it is entitled to the credit of having lucidly stated the general question, did not settle it. The merit of settling it remained for the supreme court, and pre-eminently for Chief Justice Ames, in the case of *Taylor vs. Place*, decided in 1856.\* The decision

\*In a republican form of government the governmental powers are distributed into three departments, the executive, the legislative, and the judicial. If the distribution were perfect, that is to say, if the executive power were given exclusively to the governor and the other executive officers, the legislative power to the legislature and the judicial power to the judiciary, it would logically follow, that no one of the three departments could exercise any of the



there, rejecting the illogical concession of the opinion, denies to the assembly every vestige of judicial power. The exhaustive judgment, delivered by Chief Justice Ames, is an enduring monument to his juridical ability and erudition. The decision had scarcely been recorded, before the question came up anew in the general assembly on petition to it for new trial, in the memorable case of *Ives vs. Hazard*,—a case which, under the inflammatory rhetoric of Thomas R.

powers of either of the other two without usurpation or a violation of the constitution. In point of fact the distribution is seldom or never perfect. In Rhode Island the general assembly has the entire legislative power; but it has also powers which are not strictly legislative. The judicial power is in terms conferred on the courts, by the provision first quoted in the text, and accordingly would belong to them exclusively, without doubt, but for the other provision quoted in the text, being Section 10 of Article IV. of the constitution. In any controversy between the assembly and the courts as to whether the assembly has, in a particular enactment, exceeded its province and usurped a power belonging exclusively to the courts, two questions may come up for decision. The question may be first, whether the power exercised in the enactment was judicial. This is a question of constitutional law and must be decided as such by the court. If the power is held to be judicial, then the question is, whether, notwithstanding it is judicial, the assembly has not the right to exercise it under Section 10. The supreme court decided in *Taylor v. Place* that no such right is reserved to the assembly by Section 10, because Section 10 only reserves to the assembly such powers as are not prohibited, and the grant of the judicial power to the courts, prohibits it by implication to the assembly.



Hazard, set the whole state to seething like a boiling caldron. The debate which followed was one of the ablest, as it was one of the most exciting, in the history of the assembly. The speech of Thomas A. Jenckes, then a member of the lower house, was a master-piece of deliberative oratory. The petition, however, which was primarily the occasion of the debate, went over from session to session, without any decisive vote, gradually losing popular favor, until February 15, 1860, when, after having run the gauntlet of several different committees and after having been hotly discussed for nearly three years both in the assembly and by the public press, it was finally disposed of by giving the petitioner leave to withdraw. Thus happily all danger of collision between the assembly and the court was averted; and since then the assembly has never, intentionally at least, encroached upon the proper province of the judiciary.

The reader will be glad now to pass to less technical topics. The higher court as originally established under the royal charter, consisted as we have seen of twelve judges,—the governor, the deputy governor, and the ten assistants,—so that when full it was the





exact numerical counterpart of the jury. In point of fact it was seldom or never full. Usually only seven or eight judges appeared. At first they held their sessions in a hall or the large room of a tavern; later in the colony house. The high sheriff wearing his sword attended with some of his deputies to keep order and execute the commands of the judges. The crier was there, more conspicuous then even than now, the proclamations being more frequent. A functionary called a recorder, who likewise served the assembly and who in 1702 was forbidden to practice as an attorney, did duty as clerk. The crown was represented by two officials—the attorney general and a solicitor.\*

Of the early bar we know next to nothing; but the regular lawyers were few and must have been imperfectly trained and slenderly equipped. The Honorable Wilkins Updike tells us that even a good lawyer,

\*The two offices were created in 1650: that of solicitor was not filled after 1684. The act creating the office of attorney general, after defining its duties, proceeds with quaint and picturesque metaphor to declare, "and because envy, the cut-throat of all prosperitie, will not fail to gallop with its full career, let the sayd attorney be faithfully ingaged and authorized and encouraged." Such rhetorical spangles in the colonial records startle us like rubies in a rubbish heap.



before the Revolution, could carry his whole library in his saddlebags. Many men, not bred to the bar, but with a predilection for pettifogging, essayed the profession. Indeed, in colonial times, an acquaintance with the rudiments of jurisprudence was not uncommon, law and theology then getting the desultory attention now given to literature. But let not the reader rashly rate the bar according to its learning. In the eighteenth century the practice of law was the most attractive of secular pursuits, especially to men of talent and ambition, many of whom with little learning achieved success and even celebrity by sheer force of intellect. The forum was the great field, and, except the pulpit, almost the only field, for oratorical display. When an important case was on, the people flocked in crowds to witness it, and the trial was too often converted into a forensic tournament for their entertainment. There were men, too, to whom litigation itself became a passion or an appetite. They gambled in law suits, pursuing their adversaries from tribunal to tribunal with an eager and relentless pertinacity. The assembly tried to check the evil by heavy fees, but with little success. In 1718



the assembly, for greater dispatch of business, limited the number of lawyers permitted to argue a case to two on a side, one of them to be a freeholder of the colony. The inference is that previously the privilege of argument was unlimited.

Wilkins Updike, who could easily go back in memory to the first decade of the present, and by family tradition far into the preceding century, tells us that the earlier, in comparison with more modern, advocates made a more plentiful use of narrative, going minutely into the history of the case and into the characters of the parties and indulging freely in anecdote and popular illustration. Appeals to the passions, the prejudices or the sympathies of the jury were always in order; and satire, ridicule and invective were resorted to without scruple whenever they could be effectually employed either to win a verdict or to blackguard an opponent. Meanwhile the judges made it their chief business to see fair play, listening rather than directing, and thinking themselves fortunate when by silence they escaped unwounded in the conflict. At the same time, Mr. Updike adds, the manners of the bar were ordinarily highly dignified and



courteous.\* General Varnum, in his introduction to the report of the case of *Trevett vs. Weeden*, commends the practice of publishing the better specimens of argument, as calculated to improve the existing style of forensic discussion, which he describes as "replete with inaccuracies, absurdities, and (to the shame of some practitioners) scurrility itself." The droll anecdote told by Henry Bull about himself throws a merry twinkle of light on the old time, showing with what ready reliance on their wits young men then entered the profession. Henry Bull, born in 1687, attained distinction early in the last century, being elected attorney general in 1721. The anecdote follows:—"When he made up his mind to practice law, he went into the garden to exercise his talents in addressing court and jury. He selected five cabbages in one row for judges, and twelve in another row for jurors: after trying his hand thus awhile he went boldly into court and took upon himself the duties of an advocate, and a little observation and experience there, convinced him that the same cabbages were in the court house which he thought he

\*Introduction to Memoirs of the Rhode Island Bar.





had left in the garden, five in one row and twelve in another."\* The satire is rather broad and Rabelaisian, but the intelligent reader will see the truth behind the caricature.

These imperfect notices do not, on the whole, convey a favorable impression. They indicate a rude, rambling and intemperate loquacity in speech, coupled with indecorous levity or effrontery in demeanor. This, however, is only one aspect. There was the promise and also the reality of better things. There must always have been lawyers who cultivated a worthier manner, endeavoring to argue their cases with seriousness and simplicity, on their merits; and from the first it must have been these lawyers, and not the mere makers of comical or frothy harangues, who led the bar. The precept and the example, more efficacious than the precept, of General Varnum, were productive of excellent results. An ideal of argument, combining elegance with power, discarding vulgar clap-trap, and rising to a masterly method, a brilliant concatenation of logical links, the fruit of patient toil and study as well as of impromptu in-

\*Memoirs of the Rhode Island Bar, p. 24.



spiration, gained a commanding vogue and inspired the minds, which were captivated by it, with a sincere and strenuous desire to realize it in practice. The generation after Varnum ushered in the golden age of forensic oratory for Rhode Island. Men of splendid rhetorical gifts, like Burges and Burrill and Robbins and Hunter and Whipple and Atwell, dominated the forum, illustrating a purer as well as a richer and more elaborate style of speech. Judge Story, who sat as United States Circuit Judge in Rhode Island from 1812 to 1845, is reported to have said that he found no abler bar than the bar of this state anywhere in his circuit.

Two points in Mr. Updike's account merit remark. One is, that the earlier lawyers were more given to narration than the later. Trials of old were mainly jury trials. A jury likes a story. It is curious to learn all the facts and circumstances of the case it is going to try, and it delights to have them narrated clearly and in order, like a tale well told, with the incidents that give them life and character, so that it can quickly apprehend and easily remember them. Of course it is not offended by any sort of episodi-



cal embellishment or piquant irrelevancy which will help to give the material facts a significant setting. It is a great art—that of putting things. The lawyer who has a good case and has stated it well, has already more than half won it, for he has enlisted the interest of the court or jury in his view of it. Thereafterwards neither court nor jury will be likely to overlook anything in his favor. Mr. Updike conveys the impression that the old lawyers—many of them—abused their privilege, and under the pretence of stating or arguing their cases, occupied the minds of the jury with assertions and anecdotes, encomiastic of their clients or derogatory to their opponents, but utterly impertinent to the issue, and in that way succeeded sometimes in gaining verdicts which were not supported by any proper proof. Doubtless of old such a practice may have prevailed, for even now the practice is not wholly obsolete. Nevertheless the art, however it may have been abused, flourished, and many lawyers cultivated it rightly, gaining a consummate skill in the legitimate use of it. The great lawyers of the earlier half of the present century were most of them masters of the art, and masters too even



when they were not otherwise highly gifted as advocates. Thus the late Benjamin Hazard was a dry and severely intellectual reasoner, with no moving power over the imagination or the feelings, but he knew how to put a case perspicuously so as to insure to every point the most telling effect. Mr. George G. Channing, in his "Early Recollections of Newport," says: "He had a way—'a dry way,' some called it—of mapping out his case with 'buts and bounds,' and so accurately as to rivet the attention of court and jury and, better still, secure for his client a favorable verdict." Of course perfection in the art was not attained without sedulous practice, and it is to be noted that, to insure success, even those lawyers who were the most proficient always came into court thoroughly saturated with their cases, so that they had all the details of them on the tip of the tongue and seldom had any occasion to resort to the leaden pages of the record. They knew that nothing is more utterly non-electrical than a written record, that it cannot be listened to without effort, and that when listened to, if complicated, it can seldom be accurately understood at the moment. They made their state-





ment orally, but with analytical exactitude, deliberately, but with animated intonation, passing in logical sequence from point to point, dwelling with appropriate emphasis and amplification on the more critical points, and, whenever they had to read a document or a passage from the record, reading it distinctly, with pauses on names and dates to enable the hearer to write them down or to take them completely in and plant them in the memory,—thus as they developed the case clearing it of all obscurity. In this way they communicated to the hearer, without tasking his attention, a clear and firm conception, preparing him to listen to the argument with a perfect appreciation of every part of it. In nothing did they excel the lawyers of to-day more conspicuously than in their power of lucid statement. Now—not always of course, but too often—the practice is, notably in trials to the court, to slur the statement over perfunctorily, as a matter of no moment in comparison with the evidence and the argument. Some lawyers seem even to have adopted the Horatian rule for an epic poem, as the proper rule for a legal argument, and rush at once *in medias res*. The consequence is the court has to make the case out piece-meal, as the



hearing proceeds, or to rest content with a sort of dissolving view, until it can read the record for itself. It is true this slurring of the statement is compensated for in part by briefs, as it is doubtless attributable in part to too great a reliance on briefs; but briefs are not required in all cases, and when required, however perfect they may be as briefs, they have none of the magic of living speech. Surely some recurrence to the older manner would be an improvement

The other point deserving remark in Mr. Updike's account, is his commendation of the manners of the earlier bar. He says their manners "were ordinarily highly dignified and courteous." The praise is cursory, but I am inclined to think it has a meaning beyond what is apparent, in that it involves a comparison between the earlier and the later bar and points to a gradual change of manner, which Mr. Updike must have felt sensibly, though he may never have troubled himself to analyze or interpret it. The character of this change, as I infer it from my recollections of some of the old practitioners, may be stated thus: namely, that the earlier lawyers were more punctilious than the later in observing the forms and



conventionalities of professional courtesy. There was of old an etiquette, or, if I may say so, a ritual of the forum, which was habitual to both bar and bench, and which, though it may often have been merely superficial, had nevertheless a good influence, inasmuch as no lawyer could conform to it and at the same time be ill-natured and rude, without feeling himself tacitly restrained or rebuked. Nor was this all; for those trite and old-fashioned forms, when used with sincerity and feeling by men of high and genial nature, were capable of becoming vehicles of a genuine grace and amenity, such as too seldom finds expression now that they are so commonly disused. The change corresponds to a change frequently remarked in the politer social circles, when the ceremonious urbanity of the "Old School" is contrasted with the free and familiar manners of the day. Possibly the change may be only the prelude to something better because truer; but meanwhile, until the better and the truer comes, the decay of the old manner will not fail to be regretted, by those who are conscious of it, both at the bar and in society.

The earliest account which we have of the character



and conduct of the higher court, is the account given in 1699 by the Earl of Bellomont, in his report to the Lords of Trade, before mentioned. "Their courts of justice," he says, "are held by the governor and assistants, who sit as judges therein, more for constituting the court than for searching out the right of the causes coming before them or delivering their opinion in points of law (whereof it's said they know very little). They give no directions to the jury, nor sum up the evidences to them, pointing unto the issue which they are to try. Their proceedings are very unmethodical, no ways agreeable to the course and practice of the courts in England, and many times very arbitrary and contrary to the laws of the place; as is affirmed by the attorneys-at-law that have sometimes practiced in their courts." The account is far from flattering, but it is probably not wholly devoid of truth. The governor and the assistants were not lawyers, and therefore they could not preside like the judges of the higher English courts. It is very evident, however, that the Earl of Bellomont lent a greedy ear to every sort of slander and gladly overcharged the unfavorable features of his report. His account, therefore,





regarded even as an account of the court of that early day, is not to be taken without due allowance.

In 1708 Governor Cranston reported to the Lords of Trade on the state of the colony. On the administration of justice, however, his report was very meagre, stating simply that a court was held twice a year at Newport, at which were tried all actional and criminal cases happening within the colony, and that there "the laws of England are approved of and pleaded to all intents and purposes, without it be in particular acts for the prudential affairs of the colony."

A judicial tribunal, though it conducts its proceedings publicly, seldom excites public comment or criticism, unless it is either exceptionally good or exceptionally bad. For nearly sixty years after 1708 little or nothing is to be found either in censure or praise of the Rhode Island judiciary, and therefore it may be inferred that during that time it performed its duties at least moderately well. In 1767 a letter was written by George Rome from Narragansett, vilifying the Rhode Island courts. Nothing ever damaged their reputation abroad so much as this letter, which afterwards from political causes became widely



known. Yet it must be received with extreme caution as the letter of an enemy. Rome was a zealous royalist, and as such regarded the democratic institutions of Rhode Island with aversion, and was predisposed to give the worst possible construction to the conduct of judges elected by the general assembly. He wanted to see the charter ("their pernicious charter," he called it,) abrogated, and the colony ruled by magistrates appointed by the crown, and his letter, which is a confused jumble of generalities with but few facts, was written with partisan exaggeration in advocacy of his wishes. He was a Londoner and had got his idea of judges from the ermined functionaries of Westminster Hall, and of course was disgusted to find a farmer or a trader or a physician on the bench. Moreover he was biased by personal as well as political feeling. He was an agent of British creditors and as such sometimes prosecuted British claims in the Rhode Island courts. He soon discovered or thought he discovered that the judges were inclined to favor the Rhode Island debtor at the expense of the British creditor, and that sometimes even a plain note of hand did not reach execution without a good



deal of obstruction and delay. To this extent he may have had reason for complaint. It cannot be supposed that judges, elected year by year from the people, can instantly have schooled their minds to the imperturbable impartiality of learned and practiced judges holding office during good behavior. Some degree of popular sympathy was inseparable from the system. Such judges would naturally commiserate the distressed debtor, and would desire to shield him from a relentless creditor, though, of course, they could not do it on the bench without doing wrong. Rome, however, watching them with his jaundiced eyes, saw in their conduct, not simply the influences of an undisciplined sympathy, but corruption, iniquity, and a wilful perversion of the law. This is what he charges in his letter, condemning all the judges indifferently, except James Helme, the Chief Justice. The letter became publicly known in 1774. There was instant demand for inquiry into the truth of its scandalous allegations. Rome was brought before the general assembly and asked if he was the author, a copy of it being produced. Taking advantage of the absence of the original, he refused to criminate him-



self by answering. He saw at once that his charges were too gross for proof and so, without retracting, adroitly left them unacknowledged.\*

Little of interest can be found in print in regard to the character of the courts during the Revolution and for fifty years afterwards. The judges continued to be annually elected and were mostly unlearned in the law. Courts so constituted were faulty of course; but they seem nevertheless to have administered justice with fair success. It is true the tradition of the bar does not flatter them; but tradition paints with a free brush and delights in fantastic effects. The fact that such able lawyers as William Ellery and David Howell were willing to serve in the higher court as associate justices, and that James Burrill and Tristram Burges, at the zenith of their professional renown, each filled the office of chief justice for a year, is pretty good proof that the court was held in high honor, for certainly it could not have tempted them by its emoluments. Indeed the old system suited the old time far better than men are apt to suppose, inasmuch as the old time differed far more from the present than

\*See Updike's History of the Narragansett Church, pp. 332-42.





they readily realize. The men of that day did a good deal of thinking for themselves, without depending on their newspapers, and they naturally liked judges who thought as they thought, better, perhaps, than they would have liked judges whose mental processes were too deep or too subtle for them. Materially too, more even than intellectually, the old time differed from the present. At the close of the Revolution the population of the state was only 52,347. It took the next fifty years for it to reach 100,000. The people had been terribly impoverished by the war. They resorted for relief to paper money only to find it a disastrous delusion. For fifty years they struggled with their distresses, slowly surmounting them. Business increased during those fifty years, but it increased gradually and mainly along the old lines, following the old methods. Hence there was comparatively little novelty or complication in the questions of law which grew out of it, and plain business men, relying on their common sense and knowledge of affairs, could ordinarily cope with them. It is only within the last fifty years that the state has marvellously developed and diversified its industries,



multiplying and complicating all the relations of business in a like marvellous manner. And it is during this period of prodigious progress that the character of the court has completely changed. The old system may be said to have come to an end, or at least to have reached its time of transition, in 1827, when Samuel Eddy succeeded Isaac Wilbour as chief justice. Since then the new judges have all been lawyers. They have come to hold their offices by a more durable tenure, and to receive by degrees a more adequate compensation for their services.

The reader will remember that the code of 1647 enjoined on the court the duty of charging the jury with strict impartiality. He will note, however, that in 1699 the Earl of Bellomont reports that the courts "give no directions to the jury nor sum up the evidences to them." It seems, therefore, that between 1647 and 1699 the practice of charging the jury had fallen into desuetude. According to tradition it was not until one hundred and twenty-eight years afterwards, that the practice was revived. Meanwhile counsel were in the habit of arguing questions of law and of reading law-books to the jury. Hence probably



originated the idea, once quite commonly entertained, that the jury, particularly in criminal cases, were judges of both law and fact. To us now it seems incredible that great lawyers, like James Burrill and Tristram Burges, sitting as chief justices in jury trials, did not charge the jury ; and yet it has not come down to us that they ever departed from familiar usage. It is related that when Judge Story introduced the practice into the circuit court, not only of instructing the jury in the law, but also of minutely summing up and commenting on the testimony, pointing out its particular applications, the old lawyers resented it as a presumptuous innovation. The question that occurs to the modern lawyer is, what use was there for the court if it did not instruct the jury in the law. There was of course much use for it. By the old strictness of special pleading the real issues were better sifted out than now, so that more generally than now, if the question was one of law it went to the court on demurrer, if one of fact it went as such, unmixed with law, to the jury. Formerly, too, questions of evidence were more numerous than now, and, as they came up, they not unfrequently brought the entire law



of the case up with them, and the court, in ruling on them, could and doubtless did often express their opinions at large for the benefit of the jury. Suppose, however, the case involved a doubtful question of law which the jury, being conscientious, desired not to decide, or which, being divided in opinion, they could not decide, how could they find a way out of their difficulty? In such a case a ready way was open to them. They could either render a special verdict, finding the facts specifically and leaving the court to enter judgment on them, or they could find an alternative verdict, for the plaintiff, if the court should determine the doubtful point of law in his favor, and for the defendant, if the court should determine it against him. The records show many such verdicts. And the practice is illustrated in *Randall vs. Robinson*, before mentioned. It was when the jury, assuming a partisan attitude, insisted on returning a general verdict, deciding the question of law for themselves and deciding it wrong, that the greatest liability to injustice occurred. In such a case the only remedy was a new trial, granted either by the court or the general assembly, and the court would





seldom interfere unless the error was patent. In intricate cases jury trials under such untoward circumstances must have been exceedingly unsatisfactory, and intricate cases were constantly growing more frequent. Of course the chances of disagreement were increased many fold, when a jury could disagree on the law as well as on the fact. The need of instruction from the bench must have been seriously felt long before it was required. Probably the reason why it was not sooner required was because so many of the judges were laymen. At any rate in 1827 Samuel Eddy, an educated lawyer, was elected chief justice, and in 1827 an act was passed making it the duty of the court to instruct the jury in the law applicable to each of the cases tried by it. Even this act, however, when literally construed, did not go quite far enough, and in the revision of 1844 the court were further authorized "to sum up the evidence in each cause for the instruction of the jury, whenever they shall deem it advisable so to do."

The old system called for the election annually of thirty judges by the general assembly; to wit, five from the state for the higher court and five from each



of the five counties for the courts of common pleas. The question occurs, Why so many judges. The question can be answered only conjecturally. Rhode Island was the most democratic of the colonies. It was the colony where the freedom of the individual was most respected. This character of the colony naturally tended to express itself in all the institutions of the colony. In the judiciary it expressed itself in two ways. One way was by having the judges elected every year. The other way was by having a large number of them elected. The people thus kept themselves always freshly and fully represented on the bench as well as in the jury-box. Moreover, when the judges depended for the law rather on their own reflections than on books or precedents, there was safety in the common conclusion of several minds. And finally a numerous judiciary was popular, because a good many men liked to be judges, and the pay was so small that it cost but little to gratify their ambition. Indeed it was a point of policy to diffuse rather than concentrate the powers of the government. This was probably because there was a jealousy of centralization. But the policy served another end.



The tendency here was to an excess of individualism. Nothing was better for the correction of this tendency than the discipline of public service ; since the public servant has to look beyond his own petty concerns and to subordinate his idiosyncracies to the requirements of his office. In the old time, when there were no or but few newspapers, the only way in which the citizen could be effectually led to take a lively interest in public affairs, was by having him actively participate in them. The thirty judges were educated, by their official relation to the colony or state, to a loyalty and public spirit which they would never have attained to, if the offices had not existed.

If we could bring back again those ancient judges and see them once more as they existed in the flesh, what a rich variety of characters we should behold. They were representative Rhode Islanders, and to know them would be to know the state in its most characteristic qualities. But they have passed away, and have left—all but a few of them—little but their names to rescue them from oblivion. We call the names over, and they fall on the ear with an alien and empty sound, conjuring nothing up but a dim pro-



cession of shadows without personality. Perhaps the plodding antiquary may discover a few dull facts about them, but nothing from which those who bore them can be limned to the life. And yet those naked names once stood for veritable men, with strong minds and racy mother wit and picturesque peculiarities, the very stuff with which a Shakespeare or a Scott would have delighted to work. For illustration: This is the name of some stout old farmer, who through many years has wrung from the rough earth a homely but comfortable living, and has slowly risen by his energy, thrift and practical cleverness to a position of honor and influence among his neighbors. He brings to the bench the open and deliberative habit of mind which he has cultivated on his solitary farm, turning over and over his solitary thoughts. He knows little law, but he ponders and waits for his mind to settle slowly to its conclusion, which is pretty sure to be right. This is the name of some country squire, who, having familiarized himself with the statutes and a few of the horn-books of the law, has written deeds and wills for his neighbors, or managed their petty lawsuits for them, half lawyer, half farmer, and who, after





frequent service in the town council or the general assembly, has accepted, for the quiet afternoon of a useful life, the chief justiceship of the common pleas of his county. He brings to the bench a shrewd sagacity, not unmixed with self-conceit, and a practical comprehension of legal questions, which gives him an ascendancy over his associates, often too complete. This is the name of some city trader or craftsman, who has rubbed his wits bright and keen by collision with many minds, who knows a little of many sides of life without knowing how very little he knows, and who is therefore too ready to look down on slower but deeper men. He brings to the bench a brisk and positive perception, which is very valuable when steadied and controlled by more cautious judgments. This is the name of some gentleman of hereditary influence, who, with less practical energy, brings to the bench a tincture of liberal education and refinement. Lastly, this is the name of some leading statesman or lawyer, who has the capacity and learning which eminently qualify him for the office of judge.

Of course the foregoing are but imaginary types or suggestions. The actual judges, when they resem-



bled them most, doubtless differed from them in countless ways, being fuller of both the virtues and the defects of human nature. There were judges too, without doubt, who had nothing to recommend them but their negative qualities, and who held their places to the exclusion of better men, simply because they were too inoffensive to provoke opposition. Of course it is easy to depreciate the services of these worthy men, called to grave public duties without any adequate preparation, but such depreciation is as shallow as unmerited. More profitable is it to remember that generally they did their duties well, and to learn from thence that, for the ordinary run of judicial business, honesty, good sense, diligence and fair-mindedness are pretty tolerable substitutes for professional learning.

The list of the earlier judges of the higher court contains some names of much distinction. For instance, the illustrious name of William Ellery, one of the signers of the declaration of independence, occurs among the names of both the associate and the chief justices. Likewise among the associate justices occurs the name of David Howell, eminent in letters as well



as law. He was a professor in Brown University, a delegate to the Continental Congress, a United States district judge for the Rhode Island district from 1812 to 1824.\* He was an able jurist, a keen wit, a finished scholar. The first chief justice of the supreme court was Gideon Cornell of Portsmouth, distinguished chiefly for being the *first* chief justice. He held the office two years, 1747-9. His successor was Joshua Babcock of Westerly, a man of superior mind and education, a graduate of Yale, by profession a physician but with a strong predilection for public life. He held the office from 1749 to 1757 and from 1763 to 1764.† Next after him came Stephen Hopkins, who also held the office at two different periods, to wit, from 1751 to 1755 and from 1770 to 1776, ten years in all. He was a man of extraordinary capacity, without scholastic education, but omnivorous of knowledge, which his energetic mind

\*The names of the Judges who have successively held the office of United States District Judge for the Rhode Island District follow, to wit: Henry Marchant, 1790-1796; Benjamin Bourne, 1796-1802; David Leonard Barnes 1802-1812; David Howell, 1812-1824; John Pitman, 1824-1863; Jonathan Russell Bullock, 1864-1869; John Power Knowles, 1869-1881; Le Baron Bradford Colt, the present incumbent.

†See Updike's History of the Narragansett Church, pp. 307-15.



rapidly converted into power. He and Nathanael Greene, the one in civil and the other in military life, were the great Rhode Islanders of their day, and wherever we see the state or any part of its people moving in ways higher than the average, there we are sure to find Stephen Hopkins prominent in the movement. He had a genius for public affairs and though not a lawyer was doubtless a good judge. He also was a signer of the declaration of independence. His great rival and compeer, Samuel Ward, held the office for a year, 1761-2. Others who held or were elected for a year, were James Burrill, the distinguished lawyer and statesman; Tristram Burges, the brilliant orator; and, most marvellous of all, James Fenner, so often the chief magistrate of the state. The unwieldy but powerful person of James Fenner—a massy mound of human flesh—still remains in the memory of some of us. He was a born politician, the last of a stalwart line of such, with strong mind and despotic will, but impetuous and irascible, fitter for a war governor than a judge. His contemporaries, playfully symbolizing qualities which they ardently admired, gave him the significant sobriquet of “Old





Durham." Among the earlier chief justices, Peleg Arnold held the office longest, sitting continuously, with the break of a single year, from 1795 to 1812. Before he was judge he had gained credit by service as delegate to the continental congress. His services on the bench, though apparently well appreciated by his contemporaries, did not permanently increase his reputation. Many others might be named among the earlier chief justices, but to small purpose, so little about them has come down to us that is characteristic or humanly interesting. The tabulated list of the judges, prepared by the Honorable Secretary of State, which is appended hereto, will give the reader their names and terms of service.\* The last of the old order of chief justices was Isaac Wilbour. He was a Little Compton farmer but had been much in public life, having served in the general assembly, as speaker of the lower house, as representative in congress and as lieutenant governor. He was a man of imposing presence and dignified address. In his varied career he had picked up some disjointed knowledge of the law which, according to tradition, he liked to display

\*See Appendix.



a little too magniloquently ; but, whatever his foibles, he must have had along with them a broad bottom of good sense and a flowing courtesy, or he would not have kept his office as he did for eight years, under the ordeal of as many elections, from 1819 to 1827. His successor was Samuel Eddy, the first of the new order of judges. It is not the purpose of this tract to speak particularly of him or of his successors and their associates. Their merits as judges are generally known, and if treated at all, deserve a larger and more elaborate treatment than they could here receive.

The railroad, which has originated so many social as well as so many business changes, has had its effect on the habits of the bench and the bar. Judges and lawyers now, when they attend court, can leave home in the morning, be in court all day, and return at night. Formerly this was impossible ; and judges and lawyers, when they once reached a remote county seat, after a long and wearisome journey, remained there for the week or the term. Thus court week at Newport, or Bristol, or East Greenwich, or Kingston, was necessarily a week of sociality. Some of the

CHAPTER I. THE DISCOVERY OF AMERICA.

IN THE YEAR 1492, CHRISTOPHER COLUMBUS, an Italian, discovered the continent of America.

He sailed from Spain on the 3d of September, and after a voyage of 33 days, he discovered the island of San Salvador.

He then sailed on to the continent, and discovered the bay of San Pedro de Toledo.

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best minds of the state went the circuit, and when the day's work was over, around the fire or in the shadow of the favorite inn, they abandoned themselves freely to a great variety of instructive or entertaining conversation. In such conversation all the leading topics of the time were agitated as in a kaleidoscope, until they had shown themselves in every possible aspect or combination. There was doubtless a good deal of rough joking and coarse story-telling, but withal there were also flashes of wit and touches of humor and many a trait of thought and character which were well worth remembering. It were surely well worth one's while to listen, if one could but hear William Hunter rounding and rolling out his richly-freighted periods, or John Whipple proclaiming, in stately and sonorous phrase, his last pet paradox, or George Rivers deftly puncturing a windy platitude with his unerring wit, or Wilkins Updike relating, in his inimitable way, the comical anecdotes and reminiscences that bubbled up so humorously out of his abounding memory. The tendency was, of course, to promote an easier familiarity, not only among lawyers of all ranks, but also between the judges and the lawyers,

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and not without good results. It is possible that an artful lawyer may sometimes have used his opportunity to gain an ascendancy over some unsuspecting judge for professional purposes. But there is no tradition that this ever happened, and, if it did not, so free and friendly an intercourse must have been reciprocally beneficial. There is now a tendency to isolate the judge and treat him as a sort of dedicated functionary, severely set apart for his judicial duties. The tendency may easily go to an excess; for the isolated mind is always in danger of falling a victim to its own idiosyncracies. It needs the wholesome contact and correction of other minds to preserve its health and equilibrium.

Unfortunately,—or fortunately shall we rather say?—there is very little extant in the way of reports or sketches of trials, to afford indications from which the earlier courts can be portrayed as they appeared when in session. I know of no such report, antedating the present century, except the report of *Trevett vs. Weeden*. There is, however, a report of a civil case, tried in the court of common pleas for Providence county in 1801, which excited much interest,





when tried, for political reasons, and which, as a vivid photograph of the time, is still interesting, though in subject matter it would be more likely to repel than attract the reader. I refer to the case of John Dorrance *vs.* Arthur Fenner for slander and libel.

The case originated in certain facts which, as they came to light on the trial, may be briefly narrated as follows, to wit: In February, 1799, a stranger, without relatives or friends, who was temporarily in the town of Scituate, hanged himself in a fit of insanity. The body, after inquest, was delivered to one Gideon Austin for burial, and was buried by him on Saturday, February 13, 1799. At the time of the burial a young man, unknown, but supposed to be from Providence, was observed to be watching the interment. The circumstance aroused a suspicion that there was a purpose to filch the body. To frustrate it the grave was watched during the night by some of the inhabitants. The watch was fruitless, and, suspicion being allayed, was not repeated. On Monday morning Gideon Austin found the grave tenantless, with the tracks of a sleigh leading from it, which he with others followed to Providence and into



the yard of Dr. Benjamin Dyer. In fact the unknown young man, who had been noticed at the burial, was one of a group of medical students who were pursuing their studies with Dr. Dyer and Dr. Pardon Bowen in Providence. They had heard of the suicide of the insane and friendless stranger, and talking it over with professional nonchalance, had concluded that, inasmuch as there was nobody to be shocked by the desecration of his grave, the great interests of anatomical science demanded that they should have his body for dissection. They therefore planned to get it, and had so far succeeded, that they now had it in concealment. Gideon Austin and his comrades, having tracked the sleigh into Dr. Dyer's yard, went first to the house of the attorney general, next to the house of the plaintiff, then a judge of the court of common pleas, and having found neither of them at home, proceeded to the defendant's, who was governor of the state. The Governor referred them back to Judge Dorrance, but being unable to find him, they went to the young men who, they supposed, had taken the body, and charged them peremptorily not to dissect it. Having thus relieved their consciences they returned



to Scituate, where they found their fellow-citizens holding town meeting. The news of what had happened strongly excited the rural mind, so that Gideon Austin and his friends, with consciences renewedly quickened, felt bound to go again to Providence for further inquiry and redress. They went on Tuesday and, in the evening, finding Judge Dorrance at home, asked him for a search-warrant to recover the body; but the judge told them that such a warrant could not be legally served at night, and, in the course of the conversation, expressed the opinion that the whole matter might be accommodated without a resort to the law. The result was, he arranged for an interview between them and Dr. Bowen, which took place the following day at the doctor's house. Doctor Bowen, who seems to have been one of those bland and benignant natures, that are sometimes born into the naughty world to make things smooth and comfortable, quietly talked them over to a more lenient view of the rash escapade of his students, especially as he offered to reimburse the town of Scituate for its expenses. It was finally agreed that the doctor should pay them forty dollars in hand and engage to



have the body decently buried under the directions of Judge Dorrance, and that they, on their part, should protect his students from any prosecution by the town, or the people of the town of Scituate. They then adjourned to the tavern of Col. Hoyle, where the agreement was drawn up, and signed with formal solemnity by the Scituate men ; who thereupon, with consciences once more relieved and with forty dollars in their pockets, returned to Scituate, where, in the absence of any town meeting then proceeding, they rested in the pleasant consciousness of duty discharged. Meanwhile Doctor Bowen went to Judge Dorrance, who was not a party to the compromise, and received his directions for the burial, which when received he committed to his students for fulfilment. The students fulfilled them to the letter, burying the body at midnight, and reporting their action straightway to the doctor. The agreement being thus performed, the body rested quietly in its grave for about two hours. It was then disinterred by the students and devoted, according to the medical idea of the fitness of things, to dissection ; Judge Dorrance knowing nothing about it.





For a while all was quiet : but gradually some rumor of the matter got abroad, and directly it reached the ears of one John Beverly, who had conceived a mortal enmity against Judge Dorrance, because he believed the judge had taken an active part in certain civil prosecutions, which had seriously involved not only him but also several of his friends, among whom was Benjamin Randall, the latter. Beverly had already, before he heard of the rumor, related the story of his grievances to Governor Fenner, probably for the purpose of carrying them into politics, and, at the Governor's request, had undertaken to commit it to writing. One day, while the story was still growing under his pen, he called on Benjamin Randall, and, as the conversation naturally came round to what was uppermost in his mind, Randall told him that he had been requested by Dr. Bowen to make a beaver hat for the judge. Here was a pregnant hint. The two put their heads together and guessed, and, by a marvellous coincidence, both of them guessed that the hat was a present from the doctor to the judge for conniving at the dissection of the stranger's body. Their happy conjecture soon received confirmation.



Randall finished the hat and sent it to the judge by his son, with directions to get either a receipt for the hat or an order on the doctor for the price of it. The son returned without either. In the course of the day the judge called at the shop and told Randall, that he did not give any writing because the matter was of a *delicate nature*, and that he would rather have Randall take the hat back than give an order for the price, as it was intended as a present. It so happened that Beverly was in the shop, at the time, with several others, and, in order to irritate the judge, he began to talk about his grievances and the history of them which he was writing. This led to an angry altercation, in which the judge contradicted Beverly's version of the prosecutions, and in which Beverly hinted at "the beaver hat." The judge asked him, "what beaver hat." Beverly replied, "the one on your head, for aught I know; if you want to know more, go to Scituate." The judge looked amazed and departed, saying nothing. Beverly no longer doubted that his guess was correct, and so a new and spicy scandal went into the highly-colored history which he was fabricating.



Governor Fenner, who apparently had reasons of his own for disliking Judge Dorrance, seems to have received Beverly's history with full credence, and he made use of it without reserve for the purpose of defeating the election of Judge Dorrance to the court of common pleas. In the packet in which he went to the election at Newport, there were several members of the assembly who were fellow-passengers with him, and he freely circulated the story among them. On his arrival at Newport he repeated it to other members. He also exhibited Beverly's written history to at least one member, who was a witness at the trial, and there was some evidence going to show that other members had it to read. Judge Dorrance, however, was re-elected without opposition, though in his suit he alleged that he lost votes by the slander. He sued Fenner, both in slander, for repeating the charge against him orally, and in libel, for circulating Beverly's written history. The alleged slander, stripped of explanatory verbiage, in its final form, was this : that the judge, having had the body confided to him for decent burial, sold it for dissection to Doctor Pardon Bowen for a beaver hat, and furthermore



had the impudence to wear the hat in town-meeting, when he presided as moderator. Governor Fenner on the trial did not deny uttering the slander, but pleaded the truth in justification. To the libel he pleaded not guilty.

The trial was the sensation of the year. When it occurred, the court-room was crowded, floor and gallery, with spectators. Some of the best lawyers of the day were of counsel,—Ray Greene, James Burrill and Nathaniel Searle appearing for the plaintiff, and David Howell, Asher Robbins and Daniel Lyman for the defendant. So far as one can judge from the epitomised report of their speeches and arguments they conducted the case with masterly ability. The trial was very interesting, therefore, merely as a forensic contest. It had other points of interest. The witnesses, who were numerous and of all ranks, represented a great variety of character. One curious feature of the case is the contrast, strikingly exhibited in it, between the professional and the popular feeling in regard to dissection. Another point, of great interest to the student of human nature, is the rapid metamorphoses by which John Beverly's guess





passed from surmise to suspicion, from suspicion to belief and from belief to certitude, and then taking wings, under the form of authenticated fact, flew abroad into all the corners of the state. And still another point, of still greater interest, is the illustration which the case furnishes of the old methods of electioneering, and of the sort of secret and disreputable charges to which the earlier judges were exposed in their annual elections. The weak and disappointing point is the flimsiness in matter of fact of the defence. The defence of truth, pleaded to the counts in slander, broke down completely. Dr. Pardon Bowen testified that the beaver hat had nothing whatever to do with the dissection, but was a present, in acknowledgment of gratuitous services, of great value, which Judge Dorrance had rendered for him in the settlement of an estate, and that in fact it was ordered before the suicide. The transparent truthfulness of this witness must have carried conviction to the most sceptical mind. The verdict, however, was for the defendant. The verdict was general, and, as the case was argued to the jury on both law and fact, it is difficult to divine what may have been the reasons that led to



it. Probably the jury thought that Governor Fenner, however gross his credulity in believing, and however incautious his conduct in circulating the slander, had nevertheless acted honestly and in good faith, and that Judge Dorrance, however outraged in feeling, had in fact suffered no appreciable damages. The trial moreover was tintured with politics; and in politics a majority of the jury were doubtless with the Governor, who was the popular idol of the day. With a jury so biased, entrusted to decide both law and fact, and so utterly irresponsible for their decision, a verdict for the Governor, or at the very least a disagreement, can hardly have been other than a foregone conclusion.

The character of the defendant himself was doubtless one of the attractions of the trial, as it was probably one of the influences that contributed to the verdict. Governor Arthur Fenner is one of those figures of the past, looming vaguely and largely, that provoke an eager curiosity which, for want of memoirs and records, cannot be gratified. He traced his lineage straight to Arthur Fenner, the comrade and compeer of Roger Williams. He had large possessions, inher-



ited from his ancestors. He was a man of powerful personality, like his son James, but with vastly more ingratiating and popular manners. For fifteen years successively, he was elected governor, from 1790 to 1805, when he died in office. This period, unfortunately, was exceedingly dull and devoid of any striking event to bring him prominently forward for portrayal or commemoration. The impression which he made on his contemporaries, however, may be inferred from the language of David Howell, who, in his argument, declared that the Governor "possessed an unparalleled brilliancy of talents, and a boundless copiousness of mind, adorned with every valuable accomplishment, and replete with the moral and social virtues." Undoubtedly this was a rhetorical exaggeration; but so intelligent an advocate would not have ventured upon it, if he had not felt confident that it would awake an answering echo in the minds of his auditors. Once in the course of the trial Governor Fenner, impulsively perhaps, but very unfairly, took advantage of his great personal influence and popularity to throw the full weight of them into the scales of justice against his opponent. He



had asked a witness,—one of the Scituate men,—if he, the governor, had not advised a compromise with Dr. Bowen. The plaintiff's counsel objected to evidence of what the governor might have advised, as irrelevant, and as only designed to give the case a coloring. The governor sprang to his feet and declared that his great object was to have every fact and circumstance brought to light, so that the public might fairly judge of his conduct; and then, turning with dramatic effect, to the throng of sympathetic spectators, he invoked their attention to the trial, saying that "he wished that every public transaction of his life might be proclaimed to the world, and that every deed, whether moral or political, public or private, might be, without reserve, submitted to the inquiry and scrutiny of the public, by whose judgment he desired to stand or fall." The court permitted this extraordinary invocation to pass unrebuked, and so left it, of course, to operate with telling effect on the jury, as well as on the promiscuous crowd to which it was addressed.

But if there is reason to think the jury may have been influenced by political feeling, what shall be said





of the court? Beyond any question the court was influenced by it. When the jury was called for the trial, the plaintiff challenged nobody. Not so the defendant. He interrogated jurors and challenged them, one after another, for the most part on utterly frivolous grounds, and his challenges were uniformly sustained. The plaintiff, fearful that the drawn jurors would be challenged off and the panel packed with *venire* men by the sheriff, interposed objections but without avail. The chief justice, Daniel Owen, announced that the cause was of great importance, and had become a matter of great public anxiety, because it concerned the feelings and the reputation of the chief magistrate of the state; that he was, therefore, chiefly desirous of having "suitable men" for jurors, and that, with a view to that end, he should not confine himself to the law as stated in the books, nor to the custom of the country, nor even to the former practices of the court. The avowal was candid but most extraordinary. In the course of the trial the plaintiff raised several objections to testimony offered by the defendant, some of which were evidently valid, but the court never hesitated to overrule



them. When asked to give the reasons for its ruling, the only answer was, "it is the opinion of the court, that the witness go on and tell all he knows." The trial lasted four days, and on the fourth, being Saturday, the jury retired to their room at 9 o'clock in the evening. They remained out until the following Monday morning, when they came into court and declared that they could not possibly agree. The court sent them back, the chief justice telling them that he was of opinion that their disagreement was owing chiefly to an unaccommodating party spirit. In the afternoon the jury again came into court, bringing a verdict for the defendant signed by all the jurors ; but being asked by the clerk, when he read it, if it was their verdict, one of the jurors immediately disavowed it, while two or three others rose to make explanations. The chief justice, however, immediately stopped them, told them they were dismissed and that they must retire. The plaintiff's counsel protested, but in vain, against the recording of the verdict, the chief justice declaring that he could not see why it was not a good verdict, since all the jurors had signed it.



If we were to take this as a representative trial, we should undoubtedly come to the conclusion, that it was the individual opinion of the judges, warped or colored, as it might be, by the passions or the prejudices of the moment, rather than the calm and impersonal reason of the law, that shaped and controlled their decisions. Such a conclusion, however, would unquestionably wrong them. Daniel Owen was scarcely an average judge; yet Daniel Owen himself would be wronged, if he were judged only by this trial. In 1790 he had presided over the convention that adopted the federal constitution, and had received a unanimous vote of thanks for his candor and impartiality. From 1791 to 1795 he had been chief justice of the supreme court. Doubtless he was in the main, though rather ignorant, a sensible and upright man. Unfortunately, in the case of *Dorrance vs. Fenner*, a malign and insidious influence was at work, such as has often proved too potent for even the best of judges. In it a court which was, as it were, the veriest shuttlecock of partisan politics, had to preside at a trial, involving a strong political feeling, in which the most powerful leader of the dominant party was deeply inter-



ested as defendant. It was hardly in human nature for judges, so placed, to keep their equanimity undisturbed. The case, therefore, while it exposes the faults of Daniel Owen and his associates, likewise illustrates, even more conspicuously, the faults of the system under which they held their offices, showing how impossible it was for the judges to be strictly impartial, so long as they were so utterly dependent.

Cases like *Dorrance vs. Fenner* are exceptional. The civil cases which usually occupy the courts are cases without much popular interest. They grow out of the ordinary concerns of business or social life, and change with it. It would, doubtless, prove instructive, if we could have them tabulated for a century or two, so that we could distinctly discern and study the changes of litigation from decade to decade and from generation to generation. The tables so compiled would probably illustrate, in many curious and unexpected ways, the progress and vicissitudes of society, the creation of new methods of business and new forms of industry, and the development of new legal and ethical ideas.

Formerly criminal in comparison with civil causes





occupied a proportionally larger portion of the time of the higher courts. Formerly, too, criminal causes were regarded by both the bench and the bar, as more important, comparatively, than now, and were, consequently, tried with more skill and elaboration than now, the leaders of the bar willingly taking part in them. The reasons for this are not difficult to discover. Civil cases of old were mostly jury cases. They were usually for small amounts and brought to the lawyers, engaged in them, a small remuneration. Ordinarily, therefore, even in the matter of fees, a large criminal, was almost as attractive to the lawyer as a large civil practice. But further, criminal trials are, as a rule, more sensational, fuller of surprises and richer in characteristic or dramatic incident, than civil trials, and consequently attract a more numerous and a more varied concourse of spectators; and so they afford a greater scope, not only for ingenious forensic strategy, in prosecution and defence, but also for the effective display of oratorical talent. An eloquent criminal advocate is sure of a wide popular renown. This, so long as the old idea of the profession, as honorary rather than mercenary, held its



ground, was considered as in itself a desideratum. Samuel Y. Atwell achieved his greatest forensic triumphs on the criminal side of the court, and continued, to the end of his life, to be employed in criminal causes. John Whipple was chiefly famous as a civil advocate, yet one of his last, as well as most brilliant, appearances before a jury, was in defence of an indictment for larceny. Latterly the gains of a successful civil business are so large that the ambitious young lawyer has become ambitious of money more than of fame, and disdains a practice in which the profits are precarious. The effect of this on the administration of justice is probably not a matter for regret; for, in consequence of it, guilt is surer of its desert, and innocence, now that it has acquired the privilege of testifying in its own behalf, seldom stands in any serious jeopardy. I mention the change, not to lament it, but simply as a fact in the judicial history of the state.

The law, even while it remains fundamentally the same, is continually manifesting itself, in the cases which come up for trial, under different aspects. Portions of it, too, are more involved in litigation at



one time than at another. A rule or principle of the law may possibly reach that beatific stage in its development, when it has become so perfectly assimilated that it is instinctively obeyed, or when it has become so perfectly understood that it is obeyed without resort to the courts. The old law may fall into partial desuetude, because inapplicable to the new circumstances. A new industry often yields a plentiful crop of lawsuits. And legislation is continually modifying or superseding the common law. It sometimes seems as if there were a fashion or epidemic in lawsuits, and a single case, of novel impression, is but the precursor of many similar cases following closely after it. Thus, the court-room, in spite of its incessant strifes, is a scene of varied interest, and the remark of old judge Buller, which the late Chief Justice Ames used to repeat with such sympathetic gusto, "That his idea of Heaven was to sit at Nisi Prius all day and play whist all night," is not so dreadfully shocking after all, particularly if it be compared with what other and, doubtless, devouter men have said or sung about the same locality.

Of course many kinds of cases, familiar a century



ago, are familiar still ; but there are kinds, familiar then, which have ceased to be familiar now, and kinds, unfamiliar then, which have become familiar now ; as there are also cases, now continually in court, of a kind that was then unknown. Cases in constitutional law are of the kind last named. Cases in the law of fire or life insurance, so frequent now, were very rare fifty years ago. The law of railroads, which is now a study in itself, has grown up within less than fifty years. The law of corporations, though an old head of the law, has greatly expanded within the same period, developing new doctrines and distinctions. A similar remark may be made of the law of equitable estoppel and of trade marks. The law, under which towns and cities have become civilly liable for their neglects of municipal duty, is a creation of the present century. Indeed there is scarcely a province of the law which, in these latter years, has not been either extended or freshly elucidated. And this growth is not the growth of a mere abstraction, but it corresponds to a progress of the actual world, translating the new jural relations which that progress brings with it, into words. It has, of course, had





its influence on both the bench and the bar, exacting of both a closer and ever closer study and exploration of the entire field of jurisprudence. The judge now must be a jurist: nay, more, he must acquaint himself, not only with the rules and principles which make up the law, but also, if he would not fall into error in applying them, with the principal facts of the business and social world. And the lawyer, for any marked success, must be more than an eloquent advocate; he must have threaded the labyrinth of jurisprudence, and hold the clew of its multitudinous mazes in his hand. He, too, must be familiar with the world of affairs, and must be capable of quickly separating the important from the unimportant in the masses of miscellaneous matters which so often confuse and obscure the questions which come to him for consideration. The profession here has, to some considerable extent at least, adapted itself to the new demands upon it, and has undergone a corresponding change of character. Time will doubtless bring other changes; and, since a complete mastery of the law in all its branches is getting to be too much for any one mind, the lawyers must probably soon consent to a division of labor, and severally choose their specialties.



One of the influences, educative of the bench and the bar,—of the bar especially,—too important to be passed over without mention, was the sitting in Rhode Island, semi-annually, of the United States circuit court. The court was held by a supreme court judge, sitting with the district judge. From the first the judges of the supreme court of the United States were men of high character, sound learning and tested ability. The circuit courts were, therefore, naturally looked up to as patterns or exemplars for other courts. Prior to 1812 the circuit court in Rhode Island was held first by Chief Justice Jay, and afterwards by Justice Cushing. No tradition has descended to us in regard to the manner in which they fulfilled their functions; but doubtless the contrast between the circuit court, presided over by John Jay, and our highest state court, contemporaneously presided over by Daniel Owen, was sufficiently marked to be instructive.

From 1812 to 1845 the circuit court was held in Rhode Island by Judge Story, one of the greatest of American jurists. When he took his seat he was still in the glorious flush of youth, full of learning,



which he was always enriching by a deep and various study, extending even to the continental and the civil law. For him the work of the court was not so much a labor as a delight. His manners, expressive of his character, were exceedingly amiable and attractive. He was of an enthusiastic temperament, communicative and confident, and his exuberant mind was perpetually running over with the rich results of his extensive reading. His spirit was contagious, and excited the lawyers who practised before him to profounder study. Indeed, he made them feel the need of it; for it was one thing to try a case in the state court before a jury left to guess at the law, and too often even bewildered in regard to the testimony, and quite another thing to try a case in his court to a jury with whom he had the last word, laying down the law for them so clearly that they could not misapprehend it, and recapitulating the evidence according to that logical order which, in itself, is light. His example probably did much to open the eyes of the people of the state to the need of having the jury instructed by the court, and of having a court that was capable of instructing the jury; for, however



some of the older lawyers—the Bourbons of the bar—may have grumbled at such instruction, the younger men, and even the older, if not too inveterately prejudiced, could not have failed, seeing its good effects, to be reconciled to it.

The high fame of the judge added to the business of his court. The great cases—the cases involving large amounts of property or difficult questions of law—somehow found their way to him for decision. Rhode Islanders even expatriated themselves for the privilege of suing in the circuit court. This they did especially in cases in which equity afforded the only, or the only adequate remedy. The careful thought and research and copious learning devoted to such cases by Judge Story, in his elaborate opinions, was of itself a valuable lesson, as well as a brilliant example, for the bar. Moreover the argument of intricate and important questions before him came to be considered as an arduous and formidable undertaking; and the result was the occasional employment of eminent counsel from abroad. Daniel Webster, in the prime of his powers, made several arguments in the circuit court for this state. To listen to such a law-





yer, to study his methods, or better still, to burnish and buckle on the armor of the law and contend with him, in the presence of such a court, was both a lesson and an inspiration. Judge Story, however, the old lawyers tell us, great as he was, had his foible. He was excessively fond of talking, and, when counsel were making points which did not command his instant assent, was too ready to anticipate the other side and answer them. There were lawyers who knew how to humor this foible for their own advantage, and who, when they saw the threatening avalanche of law learning gathering head and impending from the bench, had the cunning to stand aside and simply help to launch it on their hapless adversaries.

The successor of Judge Story was Levi Woodbury, an able and a painstaking judge, but, in comparison with Story, rather ponderous. Woodbury died in 1851, and was succeeded by Benjamin R. Curtis, who held office for six years. Judge Curtis was an almost faultless judge. He listened attentively to every argument, seldom interrupting it; but the very closeness of his attention was a tacit rebuke to repetition or irrelevancy and a tacit encouragement to compression. In



charging the jury he scrupulously accorded to every phase of a case its proper prominence, and gave his instructions in even and passionless tones, as if he were uttering not his own thoughts but the pure oracles of the law, unadulterated by personal feeling. His charges, like his opinions, had the condensation and the lucidity of crystal. If Judge Story taught the bar the value of research and study, sometimes seducing them into a luxuriant prolixity of learning; Judge Curtis corrected the redundancy and disciplined them to severer methods. It is possible that he may have erred on the side of rigidity and repression; but if so, the error was very slight and venial, and time with its mellowing touch would doubtless have removed it. His retirement, after a service of only six years, was generally regretted as an irreparable loss to American jurisprudence.

These matters, however, pertain almost to our own times, and this tract has a preference for the remoter past. In conclusion let us once more revert to it.

One of the most curious relics of the ancient court of last resort is the first record book, preserved at Newport, which covers the time from 1671 to 1685,



soon after which the court was suspended under Sir Edmund Andros. Nowhere else can one get a more vivid impression of certain moral and social traits of the infant colony. The record covers all the important cases for fifteen years, civil and criminal. The civil cases are very few, not over ten or fifteen a year, and consist mostly of actions for debt in some form, with a sprinkling of actions for trespass, detainer or slander and defamation. They imply a primitive state of society. They present none of those intricate and subtle questions, which grow out of the complex activities of modern life. One or two of them, however, possess points of general interest.

The case of Philip Smith, surviving executor of John Clarke, late of Newport, physician, *vs.* Peleg Sanford, general treasurer of the colony, is historically interesting. Clarke had received, for his services as agent of the colony, what the general assembly regarded as full compensation. Clarke thought he was entitled to a further sum, and in 1673 presented a claim for 450*l.* The general assembly, while disacknowledging the claim, treated it with respect, and appointed William Harris to confer with Clarke



and report thereon, agreeing that, if then not satisfied, it would refer the claim to arbitration. It does not appear that any conference ever ensued. Clarke died April 20, 1676. In October, 1676, his executors presented a claim for 100*l*. How the claim had fallen from 450*l*. to 100*l*. does not appear. The assembly appointed a committee to examine it and report. In 1678, nothing having been done, the assembly enlarged the committee with reiterated direction to examine and report. The colonial records show no further action, but the court record shows the pendency of the action aforesaid, the amount demanded being 500*l*. A trial of it to the jury resulted in a verdict for the defendant for his costs. This result is unacceptable to the modern mind. The services of Dr. Clarke were so immense, his character was so exalted, and his fame is so dear to us, that we should have been delighted to learn that the state had never haggled with him, but that, in the fullness of its confidence and gratitude, it had hastened to satisfy his moderate demand without question.

Another civil case which cannot fail to interest the reader is an action of debt by Stephen Sabeere, of





Newport against William Blanden, in which judgment was entered on submission for the plaintiff for 7*l.* 14*s.* 6*p.* silver of New England. The case shows that even two hundred years ago, when an insolvent debtor was elsewhere treated like a criminal, the little colony of Rhode Island had already adopted the humane ideas of the present century and was earnestly endeavoring to put them in practice. The record is so remarkable that we reproduce it word for word. After stating the judgment and its amount, it proceeds as follows, to wit.: "The court considering the defendant's poverty, having not wherewith to pay the debt, and also indebted to other men, and forasmuch as a law is in the body of laws, that poor persons that have not to pay their debts, shall not lie languishing in prison, it being no way nor means to enable them, but in such cases the law provideth that officers, &c. shall appoint and order how such poor persons shall pay such debts as they are able: this court having taken into serious consideration the debtor's poverty, and the creditor's due debt, not for profuse expenses but for diet for himself and wife, do order and appoint the said debtor to pay as followeth, having made



the agreement between the said creditor and debtor ; That the said Stephen Sabeere shall have the said William Blanden to work on carpentry upon this island, and the said William shall be at the said Stephen's command concerning his work, and what work the said William shall do for the said Stephen shall be valued by workmen equally drawn by both parties, and that the said Stephen shall find the said William food and lodging at reasonable rate while he works for him to pay his debt ; and whereas the said William (as he saith) hath timber, supposing thereby to pay his debt, therefore this court do order that if the said William can so agree with the said Stephen as to take the said timber, or can sell the said timber and pay the said Stephen the foresaid debt and some costs of court expressed, then the said William shall be freed from the said Stephen, and for as much as the said William is made as a prisoner by reason of the foresaid debt and the said Stephen by appointment of the court to be paid as aforesaid, and considering that if the said William had been cast into prison, a second or third or more arrests or suits could not defeat the payment of the first, therefore this court



do appoint that the said William shall not be taken out of the hand and service of the said Stephen by any man's action whatsoever, until the said Stephen is fully paid."

A few of the criminal cases are of historic interest. Thus it appears that in May, 1672, William Harris was indicted for "speaking and writing against his majesty's gracious charter granted to this colony." The preliminary order under which Harris was held for trial had been signed by Roger Williams among others, and the indictment was probably the final flicker of the smouldering feud which had once burned so fiercely between Harris and Williams. It would seem, however, that it was either unfounded in fact or was prosecuted without vigor, for the trial which immediately followed resulted in a verdict of not guilty.

In 1678, according to the record, John Saffin of Boston was indicted for "endeavoring the subverting of a great part of the colony and to draw away the inhabitants from obedience to his majesty's authority in this jurisdiction." The indictment grew out of the claim of Connecticut, which was acknowledged and supported by Saffin, to territorial jurisdiction



in Narragansett, Saffin being interested in Narragansett lands. The accused, who according to other records, was an exceedingly meddlesome, irascible and pugnacious individual, was duly tried and convicted, and was forthwith sentenced to forfeit all his estate, real and personal, in this colony and to pay a fine of 30*l.* silver. Two other indictments against Richard Smith of Narragansett "for endeavoring to subject a part of the colony to another jurisdiction and for uttering many contemptuous speeches against the authority of the colony," were quashed for informality.

Indictments for the vague misdemeanor denominated contempt of authority, were not uncommon. Any disrespectful criticism of the general assembly, or the magistracy, or the law, seems to have been regarded as such a contempt. Prosecutions for it were freely resorted to for the purpose not only of bridling unruly tongues, but also, apparently, of getting rid of uncomfortable characters. In 1681, Archibald Forrest, who pleaded guilty to an indictment for contempt of authority, was sentenced to depart the colony within ten days after clearing himself from prison by





paying fees, and never to return to stay without leave of two assistants, any assistant, if he did so return, being empowered to send him to gaol to be severely whipped with twenty-five stripes, the punishment to be administered anew as often as the transgression was repeated. The sentence was extraordinary ; but it was not so extraordinary as that which was imposed, next afterward, on one Richard Knight, convicted of a similar offence. This sentence, as it stands recorded, was, "that Richard Knight for his transgression shall, so long as he remains in this colony, be that person that shall be the whipper of Archibald Forrest, at all times when the said Forrest by his transgressing the sentence of this court shall be brought to punishment, and if the said Knight, upon the command of any one or more assistants in this colony, shall refuse so to do, then shall he forfeit the sum of forty shillings, to be forthwith paid to the general treasury, or else the said sum shall from time to time be taken by distraint by warrant under the hand of any one or more assistants, and that he pay jury fees." It must be confessed that there was a grim humor in this proceeding, more suitable to the judgment-



seat of an Oriental Satrapy than to the court of an English colony.

The cruel sentence imposed on Uriah Clemence, described in the record as "a youth indicted for stealing a watch from Joseph Hoard of Bristol," touches the heart with pity even after the lapse of two centuries. He confessed the theft and also confessed that he had stolen a silver hook from Hoard. He was sentenced "for the several transgressions by him owned" to pay 12*l.* to the general treasurer and to be severely whipped on the naked back with fifteen stripes in the town of Newport, and if he did not forthwith pay the 12*l.* the general treasurer was empowered to sell him for a servant for the full term of seven years. The officers were to have three out of the twelve pounds, and Joseph Hoard the remainder.

It will be noticed that the sentence, above recited, provided for a sale of the convict into temporary servitude. It does not appear that so extreme a remedy was often resorted to; but the record contains one case, where an Indian, who had been convicted of breaking and entering the house of one Odlin and beating and wounding his servant, was sentenced to



pay 11*l.* to Odlin, and 20*s.* court fees, or, if the payment was not made in three months, to be sold as a slave to Barbadoes.

Generally, in the case of theft, the punishment included, besides that which was strictly expiatory, a two-fold restitution of the stolen property. For instance, if a sheep was stolen, the thief was sentenced not only to be whipped or to pay a fine or mulct to the colony, but also to restore to the owner two sheep. How the owner was assured that the two things returned should each equal in value or usefulness the one stolen, does not appear. Of course if the stolen article was unique or extremely rare, the restitution was of necessity simply compensatory. The law providing for this form of punishment was not altered until after 1767.

Among the crimes mentioned in the record is one which, once serious, has long ago ceased to have any criminal quality, namely, the robbing of Indian graves. In 1678 there were two indictments for this offence. The accused were convicted and sentenced to restore the articles taken from the graves to the house of Thomas Ward of Newport and to be severely



whipped with ten stripes or to pay a fine of twenty shillings.

The old record affords a momentary glimpse—as of a notable figure passing swiftly in a crowd—of the renegade Indian, Alderman, who achieved a lasting but an unenviable historic commemoration by firing the death-shot of Philip of Pokanoket. He appeared in obedience to a bond for his good behavior; and the record relates that, "proclamation being made for his delivery, Mr. Peter Tallman, being in court, said that he, the said Alderman, had endeavored to destroy the said Tallman's family." But it would seem that the said Tallman could not substantiate his charge, for the record adds: "the court see cause to clear him; cleared by proclamation, paying fees." And so, clouded with sinister suspicions, the sullen slayer of the great sachem of the Wampanoags stalks silently out of court and vanishes again into obscurity.

In the old book, along with the court record, inserted there by order of the general assembly, there is a record of the proceedings of a court-martial, convened at the close of Philip's war to determine the fate of certain Indian prisoners of war. These poor





captives met a dreadful doom, some of them being sentenced to death and a great number of them to perpetual servitude. Conspicuous among them was the Narragansett sachem Quenapin, a cousin of Canonchet, and next to him in command at the Great Swamp fight. Being arraigned on the charge that he was in arms against the English nation at the Great Swamp fight, that he was in the assault on Carpenter's garrison at Pawtuxet, and at Ashaway, and that he did aid in burning and destroying towns, and in taking and carrying away English captives to the number of about twenty, he proudly admitted the truth of the charge, and received sentence of death with a heroic serenity worthy of his royal lineage. Three days later he and his brother, likewise condemned to death, were shot at Newport.

The people of Newport point with pride to the Jewish Synagogue and the Jewish Cemetery, and greatly delight to relate the story of the opulent Hebrew merchants, who once flourished among them. They have, however, little to tell of the Jews earlier than the eighteenth century. The old record throws a gleam of light upon the first Jewish settlers of New-



port. Under date of 1685 it states that information was made by William Dyre against Mordicai Campanell, David, Daniel and Abraham Campanell, Saul Brown, Abraham Burges, Rachael, the widow of Simon Mandes, and Ann Reuse, Jews, charging alienage, their goods or estates being seized to answer, and that, Dyre not appearing to prosecute, verdict was rendered for the defendants. Doubtless the object was to obtain a forfeiture of the estates seized. The record does not show how the information happened not to be prosecuted. The Colonial Records, however, show that in June, 1684, the general assembly, in answer to the petition of Simon Medus, David Brown and associates, being Jews, passed a vote declaring that the petitioners might expect as good protection here, as any stranger, not of our nation, ought to have, being obedient to the laws. It is possible that the information may have been preferred before this vote, and that, after the vote, it was abandoned in consequence of it, or of the public feeling evinced by it. To us the vote seems curt and cold, but probably, at the time of it, it was regarded as exceedingly liberal.



By many entries in the record it appears that, in the old time, when the jury returned a verdict of not guilty in a criminal cause, the practice was for the court, accepting the verdict, to clear the accused, he paying fees, by proclamation. Such a formal and impressive annunciation of acquittal, in the crowded presence of the court, at a time when there was no press to give it publicity, was both just and natural. The singular part of the proceeding was the exaction of fees from the accused; for, having been acquitted, he was presumably innocent, and therefore ought rather to have received fees than to have been required to pay them. Our ancestors, however, thought otherwise, and it was not until 1769 that fees on acquittal were abolished.

Occasionally, after a verdict of not guilty, the court still refused to let the accused go free paying fees, but used a broad discretion, and, if it saw cause, either imposed other conditions or held him to answer further. Thus we read that Mathew Boomer, indicted for grand larceny, perpetrated by killing and converting to his own use several sheep belonging to another, was tried and found not guilty, but that,



the king's attorney, in the king's behalf, desiring a stop of judgment, the court also, being unanimously dissatisfied with the verdict, did see cause to grant the request and stop the judgment, the former bonds to remain in full force. In 1681 John Osborne and John Johns were severally indicted and tried for being robbers and found not guilty, but the court, notwithstanding the verdicts, sentenced them to leave the colony within three days on peril of imprisonment for contempt. And so Francis Allston, who was found not guilty on trial under an indictment for murder, was sentenced to remain in prison until his fees were paid, which were to be paid out of his estate already sequestered, and to depart from the colony within ten days, not to return without leave, and to be kept in close prison until his departure. To-day such proceedings would be unconstitutional, but of old, magistrates seem to have had, or to have supposed they had, a large power to purge the state of disreputable characters, and they paid little heed to constitutional restraints.

The jury, too, following the example of the court, occasionally used a discretion in their verdicts and,





instead of finding verdicts of not guilty absolutely, found them in the non-committal Scotch form of "not proved guilty" or of "not guilty by evidence."

The ancient court, like many a modern court, was sometimes sorely distracted by the conflicting claims of law and justice. The case of the Indian, Quashcome, was a striking instance of such a dilemma. Quashcome was tried on an indictment "for offering very great abuses unto Martha, the wife of Edmund Lay, by throwing her down in the highway and acting as if he would ravish her." The jury rendered a verdict of guilty against him. Then came the question, how shall he be punished. A majority of the court were of the opinion that, though his acts were very heinous and deserved exemplary punishment, he could not be sentenced to death for rape because the indictment did not charge it. The minority, consisting of the governor and three assistants,—being satisfied that he was worthy of death and that he must either be sentenced for rape or go unpunished, because the indictment did not, at any rate, charge any other offence,—wanted him sentenced accordingly and left to the mercy of the general assembly, being ready in



their zeal to warp the law for the sake of justice ; and, since they could not have their views carried into effect, they put them in writing and had them entered in the record. The majority, however, while finding it impossible to conquer their scruples, seem to have been rather ashamed of them ; for, though they declined to sentence the prisoner, they hesitated to discharge him. Keeping him in durance, they besought the advice of the general assembly ; but the general assembly dissolved without giving it. The court, thus unrelieved, still hesitated, and finally concluded to remand the prisoner, until the matter could be again presented to the assembly, with strict order meanwhile that no part of the chains should be removed. What ultimately became of the Indian, Quashcome, does not appear either by the court record or by the Colonial Records as published. The supposition that he escaped with life, however, is not utterly unendurable ; for the name he bore—probably a nickname—conveys the impression that he was rather a good-for-nothing vagabond than a violent and villanous savage ; and the record shows that his own answer to the charge against him was that he



had been drinking the white man's fire-water so that he knew not what he did.

Sometimes the court gave what may be termed a probationary judgment. Thus, Abraham Butterworth, committed for misbehavior to his family, being brought into court acknowledged his fault, and the court on his promise of amendment discharged him, but on condition that if he broke his promise, any assistant should have power on lawful complaint to commit him to prison again.

A striking feature of the old record is the extraordinary prevalence of sexual offences. Thirteen indictments for such offences appear at one term in 1672, and all along through the fifteen years of the record, they constantly predominate. The indication is that this debasing form of immorality, not localized but generally diffused, had become a flagrant evil, polluting the sources of society. The indication is corroborated by other evidence. The Colonial Records show that in 1655 the evil was so notorious that complaints of it had been made to the great Lord Protector, Oliver Cromwell, and that the colony, to avert rebuke, had enacted stringent laws for its abate-



ment.\* This condition is not inexplicable. Two centuries ago incontinence was far more prevalent, and was regarded as a much more venial and less vulgar vice, than it is now. A regeneration of society in this respect was one of the chief aims of puritanism; and, by a natural reaction, the early puritans became almost as much too rigid, as the wicked world from which they had separated themselves was too relaxed. In New England, Rhode Island was the favorite, and indeed the only, refuge from the moral as well as the religious rigor of puritanism; and hence it is not surprising that many, who immigrated here to enjoy what quaint Gregory Dexter called "the sweet cup of liberty," drank of it too eagerly, and fell into excesses. The way of life of many of them in the new plantations here, isolated from their fellows, tended naturally to a dissolution of moral and social restraints; and moreover to many of them that life, when freed of its dangers, was doubtless felt to be so utterly monotonous and stupid that they hungered fiercely after relief, and found it, according to their characters, either in the fervors of religion or theo-

\*Rhode Island Colonial Records, vol. 1, p. 318.





logical controversy, or in the coarse excitements of intoxication and carnal excess. It is somewhat difficult for us to understand this fully : for we with our books, newspapers, amusements,—our intellectual and social resources of all kinds,—cannot adequately conceive the miserable vacuity of a life without them. At any rate the evil grew until it was felt to be too portentous to be neglected any longer. The old court record shows what strenuous efforts were made to extirpate it. Offenders of both sexes were indifferently prosecuted and punished. They were prosecuted, even after marriage, for anticipating the nuptial night. The punishment was severe : for women it was barbarous, if they were poor, being a public whipping of fifteen stripes or a fine of forty shillings. In that age the lash was the common instrument of correction, and, during court week, the old whipping-post at Newport must have rung continually with its reverberations.

No trial of early date excited a deeper feeling than that of Thomas Cornell for the murder of Rebecca Cornell, his mother. The Cornells were well known. A Thomas Cornell, probably the father of the above-



named, was admitted a freeman at Portsmouth in 1640. He was chosen a constable in 1641, and in 1646 he received an allotment of one hundred acres of land in Portsmouth. At his death Thomas Cornell, the younger, seems to have succeeded to this estate. In 1664 he was one of the Portsmouth deputies to the general assembly. In 1671 and 1672 he was employed for the colony in important public affairs. In February, 1673, he was living on his farm in Portsmouth. His family consisted of himself, his wife, his two sons, his mother, who was a widow, seventy-three years old, and two laborers. The mother had a room to herself, with fire and a bed, and with an outer and inner door. On February 8, 1673, she was found dead on the floor in her room, with her clothes a good deal burnt and her body scorched by fire. A coroner's jury, which was forthwith empannelled, rendered a verdict, on the testimony of Thomas Cornell and his hired man Henry Strait, that she came "to her untimely death by an unhappy accident of fire, as she sat in her room." Subsequently, an examination of the body having led to the discovery of a wound on the upper part of the stomach, the jury was again



empannelled and gave verdict that she came to her death by the fire and the wound, but incriminated nobody. Speculation, however, would not sleep. The tragic mystery irresistably occupied and agitated the public mind. Stories of trouble between Thomas Cornell and his mother got afloat. The magistrates took up the inquiry and prosecuted it. Thomas Cornell was arrested and bound over to the superior court. He was indicted there, and on May 12, 1673, he was tried and convicted, and the same day sentenced to be hanged on Friday, May 23, 1673, and it was ordered that meanwhile he should be kept manacled and securely fastened to the great chain, and that a strict watch, consisting of four by day and eight at night, should be maintained about the jail. A warrant for the seizure of his estate was also issued returnable to the court. On the appointed day he met his doom and died on the gallows.

He died making no confession. In the short interval between the sentence and its execution, however, a singular thing occurred; namely, a petition to the general assembly, presented by his friends in his behalf, for leave to be buried by his mother. Doubtless



he meant to have the petition regarded as a solemn protestation of innocence ; for it is abhorrent to nature for a murderer to desire to be buried beside his victim. The assembly denied the request ; but, as a favor to him, granted his friends permission to bury him on his farm, provided that he should be buried within twenty feet of the common road, and that the colony should be at liberty to set up a monument on his grave, the interment otherwise to be under or near the gallows. After his death the assembly voted to release his estate from seizure, empowering the town council of Portsmouth to take and apply it to the payment of his debts and other charges and for the relief of his wife and children, and finally to make a will disposing of it according to law.

But, after all, a lingering doubt or misgiving—an uneasy sense of mystery unsolved—seems to have haunted and troubled the minds of men ; for so I interpret the extraordinary vote of the general assembly, passed immediately after the execution, ordering the recorder to record the proceedings and testimonies in the book of trials, where they remain to be read to this day. Apparently, however, the testimony recorded





is not the testimony which was given orally at the trial, but rather the examinations and the affidavits taken at the inquest and by the committing magistrates, and this possibly may be the explanation of some of its peculiarities. The purport of the testimony follows: On February 8, 1673, late in the afternoon Thomas Cornell spent an hour and a half alone with his mother in her room. According to his account he spent the time in conversation. He came out into the adjoining room and began to wind a quill of yarn, and, after winding about half a quill, was summoned to supper. He sat at supper with his family and his two hired men. At the close of the meal his wife sent his son Edward to ask his grandmother if she would have some milk boiled for supper. The child went and seeing fire in the room on the floor, came running back for a candle, giving the alarm. Immediately Henry Strait, the hired man, ran into the room, followed by the boy with the candle, and then by Thomas Cornell and his wife. When Henry Strait had entered the room he saw the fire on the floor, and stooping down raked it with his hands. He likewise saw a human body lying on the floor, and, in the faint



and flickering light emitted by the candle, supposing it to be an Indian, drunk and burnt, he took it by the arm and spoke to it in the Indian tongue. At that instant Thomas Cornell, coming up behind the boy with the light, saw and exclaimed, "Oh Lord, it is my mother." The body was lying on the left side, the back to the bed and the face toward the window. The clothing of the body had been partly woolen, partly cotton; the woolen is reported to have been burnt, the cotton left. There was no fire about the bed, but the curtains and valance were burnt. The outer door was observed to be fastened. The wife of Thomas Cornell testified that when they entered the room a large dog was there which leaped out over her son; but this singular occurrence does not seem to have attracted the attention of any other witness, and it is not credible that it can have happened. The hypothesis suggested by Thomas Cornell to account for the catastrophe was, that his mother's clothes took fire from a coal falling from her pipe as she sat smoking in her chair. It does not appear, however, that any pipe or the pieces of any pipe were found on the floor; and it is difficult to believe, if a coal from her pipe



had set her clothes on fire, that she would have burned to death without crying for help loud enough to attract attention. Moreover, how did the fire get extinguished in the curtains and valance, if it was set by accident? But, on the other hand, it seems scarcely credible that Thomas Cornell after killing his mother, would have imperilled his house by setting fire to her garments and leaving them to burn unwatched. These, nevertheless, are the alternatives. If a modern court had to decide between them, it would insist on a thorough autopsy to determine the exact character of the wound, and on the most minute and accurate information in regard to the situation and appearance of the body, and of the room where it was found, when it was found. With this knowledge it could probably reach a satisfactory decision; and possibly much more of this knowledge was developed at the trial than has been perpetuated in the record. In default of it we must accept such light as the record gives us in regard to the circumstances which were thought to point out Thomas Cornell as the murderer of his mother.

The hired men relate two suspicious circumstances which occurred at the time of the tragedy. They say



that one or both of the children were generally with their grandmother in the evening, but that this evening neither of them visited her room. And they say, too, that the grandmother when well usually took her meals with the family, but that this evening she was not even sent for as at other times. Her absence was so unusual that Henry Strait asked the cause of it and was told by Thomas Cornell that it was because they had nothing for supper but salt mackerel, which she could not eat, it made her so thirsty in the night. "But," the witness adds, "she used to be called at other times when they had mackerel." There was also testimony going to show that she had a claim for rent against her son Thomas which she had vainly tried to get him to pay, and that sharp and rankling words had passed between them. It was likewise in proof that she had been treated with neglect and indignity, had been vaguely threatened by her son, and forced to perform unseemly services, and that she had been heard to say that she intended to go in the spring to live with her son Samuel, but feared she would be made away with before that time. Once she had even been heard to hint at suicide. And





finally a witness, who visited Thomas Cornell in jail in company with his wife, testified that wife and husband conversed apart, and that she overheard one say to the other, "if you will keep my secret I will keep yours."

It is impossible, in view of the testimony, to say that the verdict was wholly unwarranted; and yet it is almost equally impossible to feel entire confidence in it. The case inevitably suggests a Cornell mystery of a hundred and sixty years later. In the later trial—that of Ephraim K. Avery for the murder of Sarah Maria Cornell—the accused was defended by a consummate jury lawyer, Jeremiah Mason. Thomas Cornell probably had no counsel.\* In the later trial the testimony, descending to the minutest particulars, was accumulated until it seemed to envelope the accused in an inextricable web of damning circumstances, without a loophole for escape; and yet when the great advocate and logician stood up, gigantic in

\*At common law a person accused of treason or felony could not have counsel plead for him to the jury. In Rhode Island an act was passed in 1669 making it "the lawful privilege of any person that is indicted to procure an attorney to plead any point of law that may make for the clearing of his evidence." Even this act does not seem to authorize an argument by counsel to the jury on the question of fact at issue in the trial.



body as in mind, and proceeded in his dry and deliberate argument, sifting and analyzing the testimony as he went along, the astonished jury saw it gradually dwindle and weaken and, losing coherence, give way and fall below the legal standard of proof, until they were finally forced in spite of themselves to bring in a verdict of acquittal. A tithe of the talent, expended for Ephraim K. Avery, would probably have saved Thomas Cornell. And nevertheless it is not improbable that both of them may have been murderers.

Among the affidavits preserved in the record is one which, for the credit of Rhode Island jurisprudence, it is to be hoped was not permitted to have any effect in determining the verdict. It is so curious an illustration of a superstition, which was then prevalent and which under other forms still survives, that it seems worthy of insertion here. The affidavit is as follows, to wit:

"John Briggs, of the town of Portsmouth, aged sixty-four years or thereabout, being according to law engaged before the council, testifieth: That on the 12th day of this instant month, February, in the night as this deponent lay in his bed, he being in a dream



of Mrs. Rebecca Cornell, deceased, and being between sleeping and waking, as he thought, he felt something heave up the bed-clothes twice, and thought somebody had been coming to bed to him; whereupon he awaked and turned himself about in his bed, and being turned, he perceived a light in the room, like the dawning of the day, and plainly saw the shape and appearance of a woman standing by his bed-side, whereat he was much frightened and cried out, 'in the name of God what art thou?' The apparition answered, 'I am your sister Cornell,' and twice said, 'See how I am burnt with fire.' And she plainly appeared unto him to be very much burnt about the shoulders, face and head."

The last scene in the Cornell tragedy was presented in October, 1675, when Sarah Cornell, widow, being indicted for the murder of Rebecca Cornell, "or for being abetting or consenting thereto," was tried and acquitted.

Doubtless the later records likewise contain many matters of interest; but it must be left to others to bring them to light. As sources of information such records have been too long neglected; and when



carefully explored, especially in England, they will probably yield a rich harvest for history and sociology. The purpose of this tract, which was only to glean a single sheaf of scattered facts, has been accomplished. Let me hope that the reader, while he peruses it, will remember that it is only a sheaf of gleanings; for he would be likely to fall into serious error if he were to reason and generalize from it as if it were a full history. It is rather a miscellany in which preference is given to the curious and the exceptional. It is due to the earlier courts, to declare distinctly that there is no reason to doubt, that the bulk of their business was done by them in very much the same way and with the same results as, allowing for altered law, it would be done by the courts of to-day.

The tract, however, has its lesson. It describes the growth of the Rhode Island Judiciary from its rudiments up, tracing it step by step as it has gone on gradually consolidating and developing itself to answer the growing and varying needs of the state. The changes by which this growth has been assured have sometimes been slow to come, but nevertheless





they have come always in due order and in the line of progress. They have come too without agitation or disturbance, and probably they have come without them because they have come slowly, in the fullness of time, when the state was ripe for them and when the need of them was generally recognized. When we consider these changes, so gradual but so great, so orderly and so opportune, we infer that they must have been determined by some law or principle. If we ask by what, the answer is evident: Our ancestors, perceiving that the judiciary was a vital part of their system of government, acted either consciously or unconsciously on the principle that while it was amendable, it was not to be altered radically in the interest of any abstract theory or idea, or to be remodeled after any fashionable pattern imported from abroad, but rather to be amended from time to time, as its defects came to light or as new needs called for new appliances. They held to the utilitarian or practical idea that a judiciary, like any other political institution, exists not for itself but for the work which it has to do, and that it ought to undergo such changes, but only such changes, as experience shows



to be necessary to remedy its defects or to increase its efficiency. So developed, political institutions, created by the people in conformity with their character, alter and improve with the people, so as not only to meet their new needs, but likewise so as to keep in harmony with their character. Such a growth is growth according to that law of evolution by progressive adaptations, so abundantly illustrated in the scientific world, as contradistinguished from growth, or alteration rather, according to an abstract idea; borrowed from an alien system or self-engendered in the heated brain of the speculative reformer. Such a gradual growth, though it may sometimes be out of all reason slow, is always safe both from violence at the time and from reaction afterwards.

The lesson is a good lesson to remember when changes are proposed in the judicial system of the state. Such changes will be and ought to be made, but they ought to be made in a purely practical spirit, experience being the guide. The lesson is, however, susceptible of a wider application. There are two classes of men among us over eager for change. One class consists of men who are violently hostile to what



is, because what is, however well it may answer its purpose, does not correspond with some pet theory which they entertain. The class is numerous and diversified, including reformers, agitators, visionaries, doctrinaires and revolutionists, many of them excellent men but some of them dangerous,—zealots or fanatics, dominated by abstractions or swayed by vehement sentiment, ready at any hazard to accomplish their ends. The other class is even more numerous, but its members are of a very different type;—gregarious and imitative men, born lovers of the common place, who condemn Rhode Island because she is not New York or Massachusetts re-duplicated on a smaller scale, and who, insensible to the advantages of variety, would gladly reduce the whole sisterhood of states to a featureless uniformity, making them as like as peas in a pod. Doubtless there is good in both classes, but both are too much disposed to treat the state as if it were merely a dead block or unresisting clay, to be hewn or moulded, instead of a living organism, which has grown from generation to generation, developing a distinctive character as it has grown. It is for the enlightened Rhode Islander,



avoiding the evil and accepting the good of both classes, to hold fast to his patrimony of Rhode Island law and tradition, and in no illiberal spirit, but instructed by history, to endeavor to develop whatever is excellent in it, to improve the faulty, to prune away the obsolete and the harmful, and by timely engraftments to enlarge and enrich it with the ideas and the institutions of a better civilization. And so, pursuing the safe methods of conservative reform, he will haply help on the growth of a state, firm-rooted and vigorous, stable but progressive, full of historic individuality and yet adequate to the complicated wants of the modern world, having at once the prestige of a memorable past and the promise of a flourishing future.





## APPENDIX.

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The following list of the judges of the highest judicial court of the state, after it ceased to be held by the governor or the deputy governor and the assistants, has been taken from the Rhode Island Manual, for 1882-3, prepared by the Honorable Joshua M. Addeman, Secretary of State :

CHIEF.	ASSISTANTS.	DATE.
Gideon Cornell,	Stephen Hopkins, Joshua Babcock, Josiah Arnold,	May, 1747, to May, 1749.
Joshua Babcock,	John Howland, Jonathan Randall, William Hopkins, William Hall,	May, 1749, to May, 1750.
Joshua Babcock,	John Walton, Jonathan Randall, William Richmond,	May, 1750, to May, 1751.
Stephen Hopkins,	John Walton, Benjamin Haszard, Jonathan Randall, William Richmond,	May, 1751, to May, 1755.
Francis Willett,	Joseph Russell, Joseph Clarke, Jonathan Randall, William Richmond,	May, 1755, to May, 1756.
John Gardner,	Joseph Russell, Joseph Clarke, Jonathan Randall, William Richmond, Joseph Russell, Joseph Clarke,	May, 1756, to May, 1759.



CHIEF.	ASSISTANTS.	DATE.
John Gardner,	Jonathan Randall, William Richmond, Joseph Lippitt, Joseph Clarke,	May, 1759, to May, 1761.
Samuel Ward,	Joseph Russell, William Hall, Thomas Wickham, John Barton,	May, 1761, to May, 1762.
Jeremiah Niles,	Joseph Russell, William Hall, Nicholas Easton, Samuel Nightingale,	May, 1762, to Aug., 1763.
Joshua Babcock,	Thomas Cranston, John Cole, Thomas Greene, Silas Niles,	Aug., 1763, to May, 1764.
John Cole,	Thomas Greene, Silas Niles, Job Bennet, Jr., Stephen Potter,	May, 1764, to May, 1765.
Joseph Russell,	William Hall, Job Bennet, Jr., Benoni Hall, Henry Harris,	May, 1765, to May, 1766.
Joseph Russell,	William Hall, Job Bennet, Benoni Hall, Gideon Comstock,	May, 1766, to June, 1767.
James Helme,	Job Bennet, Benoni Hall, Stephen Potter, Samuel Nightingale,	June, 1767, to May, 1768.
Joseph Russell,	Metcalf Bowler, Nathaniel Searle, Philip Greene, Samuel Nightingale,	May, 1768, to June, 1769.
James Helme,	Benoni Hall, Nathaniel Searle, Thomas Greene, Gideon Comstock,	June, 1769, to June, 1770.
Stephen Hopkins,	James Helme, Benoni Hall, Metcalf Bowler, Stephen Potter,	June, 1770, to May, 1773.
Stephen Hopkins,	James Helme, Metcalf Bowler, Stephen Potter, Job Bennet,	May, 1773, to May, 1774.
Stephen Hopkins,	Metcalf Bowler, William Greene, Joseph Russell, Job Bennet,	May, 1774, to Aug., 1776.



CHIEF.	ASSISTANTS.	DATE.
Metcalf Bowler,	William Greene, Shearjashub Bourn, Jabez Bowen, Thomas Wells,	Aug., 1776, to Feb., 1777.
William Greene,	Shearjashub Bourn, Jabez Bowen, Thomas Wells, Perez Richmond,	Feb., 1777, to May, 1778.
Shearjashub Bourn,	Thomas Wells, Paul Mumford, Stephen Potter,	May, 1778, to May, 1779.
Shearjashub Bourn,	Christopher Lippitt, Thomas Wells, Paul Mumford, Stephen Potter,	May, 1779, to May, 1780.
Shearjashub Bourn, Jabez Bowen,*	Gideon Comstock, William Ellery, Paul Mumford, Peter Phillips,	May, 1780, to May, 1781.
Paul Mumford,	Gideon Comstock, Peter Phillips, Thomas Tillinghast, Ambrose Page,†	May, 1781, to May, 1782.
Paul Mumford,	Pardon Gray, David Howell, Peter Phillips,	May, 1782, to June, 1785.
William Ellery,	Thomas Tillinghast, Pardon Gray, Jonathan Jenckes, Peter Phillips,	June, 1785, to May, 1786.
Paul Mumford,	Thomas Tillinghast, Pardon Gray, Thomas Arnold, Joseph Hazard,	May, 1786, to May, 1787.
Paul Mumford,	Thomas Tillinghast, Gilbert Devol, David Howell, William West,	May, 1787, to June, 1788.
Othniel Gorton,	Stephen Potter, Walter Cooke, John Waite,‡ William West, Stephen Potter, Walter Cooke, Simeon Clarke, Jr.,	June, 1788, to May, 1790.

\* Elected in February, 1781, in place of Shearjashub Bourn, deceased.

† Declined, and David Howell elected.

‡ Declined, and, in September, Simeon Clarke, Jr., appointed.



CHIEF.	ASSISTANTS.	DATE.
Othniel Gorton,	Daniel Owen, Sylvester Robinson, Walter Cooke, Ezekiel Gardner, Jr.,	May, 1790, to May, 1791.
Daniel Owen,	Sylvester Robinson, Walter Cooke, Ezekiel Gardner, Jr.,	May, 1791, to May, 1792.
Daniel Owen,	Thomas Tillinghast, Carder Hazard, Walter Cooke,	May, 1792, to May, 1793.
Daniel Owen,	Ezekiel Gardner, Jr., Thomas Tillinghast, William Taggart,	May, 1793, to May, 1794.
Daniel Owen,	Walter Cooke, Ezekiel Gardner, Jr., Thomas Tillinghast,	May, 1794, to June, 1795.
Peleg Arnold,	William Taggart, Walter Cooke, Joshua Bicknell, Thomas Tillinghast,	June, 1795, to May, 1796.
Peleg Arnold,	Joseph Hoxie, Walter Cooke, Joshua Bicknell,	May, 1796, to May, 1798.
Peleg Arnold,	Thomas Tillinghast, George Brown, Walter Cooke,	May, 1798, to June, 1799.
Peleg Arnold,	Joshua Bicknell, Thomas Tillinghast,* George Brown,	June, 1799, to June, 1801.
Peleg Arnold,	Walter Cooke, Joshua Bicknell, Thomas Holden,	June, 1801, to May, 1808.
Peleg Arnold,	Ezekiel Gardner, Walter Cooke, Joshua Bicknell,	May, 1808, to June, 1809.
Thomas Arnold,	Thomas Holden, John Allen, Walter Cooke,	June, 1809, to May, 1810.
	Joseph Reynolds, Henry Remington, William Marchant,	
	Walter Cooke, Joseph Reynolds, Benjamin Johnson,	
	William Marchant, William Anthony, Joseph Reynolds, Benjamin Johnson,	

\* Resigned in December, 1797, and Thomas Holden elected in his place.





CHIEF.	ASSOCIATES.	DATE.
Peleg Arnold,	Jeffery Hazard, Joseph Cudall, Joseph Reynolds, Thomas Westcott,	May, 1810, to May, 1811.
Peleg Arnold,	Jeffery Hazard, William Anthony, Joshua Bicknell, Benjamin Johnson,	May, 1811, to May, 1812.
Daniel Lyman,	Jeffery Hazard, William Anthony, Joshua Bicknell, Benjamin Johnson,	May, 1812, to May, 1814.
Daniel Lyman,	Jeffery Hazard, William Anthony, Joshua Bicknell, Charles Brayton,	May, 1814, to May, 1816.
James Burrill, Jr.,	Jeffery Hazard, William Anthony, Joshua Bicknell, Charles Brayton,	May, 1816, to May, 1817.
Tristram Burges,*	Jeffery Hazard, William Anthony, Joshua Bicknell, Charles Brayton,	May, 1817, to May, 1818.
James Fenner,	Isaac Wilbour, Henry Remington, Daniel Champlin, John D'Wolf,	May, 1818, to May, 1819.
Isaac Wilbour,	Thomas Buffum, Dutce Arnold,† Daniel Champlin, John D'Wolf,	May, 1819, to June, 1822.
Isaac Wilbour,	Thomas Buffum, Henry Remington, Daniel Champlin, Luke Drury,	June, 1822, to May, 1823.
Isaac Wilbour,	Henry Remington, Daniel Champlin, Luke Drury, Wheeler Martin,‡	May, 1823, to May, 1824.
Isaac Wilbour,	Henry Remington, Daniel Champlin, Samuel Randall, Isaac Fiske,	May, 1824, to June, 1825.

\* Elected in June, 1817.

† Elected in June, 1819.

‡ Elected in June, 1823.



CHIEF.	ASSOCIATES.	DATE.
Isaac Wilbour,	Henry Remington, Daniel Champlin, Samuel Randall, Nathan Brown,	June, 1825, to May, 1826.
Isaac Wilbour,	Henry Remington, Daniel Champlin, Samuel Randall, Samuel Eddy,*	May, 1826, to May, 1827.
Samuel Eddy,†	Charles Brayton, Samuel Randall,	May, 1827, to May, 1833.
Samuel Eddy,	Charles Brayton, Job Durfee,	May, 1833, to June, 1835.
Job Durfee,	Levi Haile.	June, 1835, to June, 1843.
Job Durfee,‡	William R. Staples, Levi Haile,	June, 1843, to May, 1848.
Richard W. Greene,§	William R. Staples, George A. Brayton, Levi Haile,	May, 1848, to Nov., 1854.
William R. Staples,¶	George A. Brayton, George A. Brayton, Alfred Bosworth,	Nov., 1854, to Mar. 7, 1856.
Samuel Ames,**	Sylvester G. Shearman, George A. Brayton, Alfred Bosworth,††	1856 to 1862.
Samuel Ames,	Sylvester G. Shearman, George A. Brayton, J. Russell Bullock,‡‡	1862 to 1865.
Samuel Ames,§§	Sylvester G. Shearman, George A. Brayton, Thomas Durfee, Sylvester G. Shearman,	May, 1865, to May, 1866. (Elected June 15, 1865.)

\* Stephen Branch elected in place of Samuel Eddy, in June, 1826.

† In January, 1827, a law was passed providing for the election of three Judges, one Chief and two Associates.

‡ In June, 1843, a law was passed providing that the Supreme Court should consist of one Chief and three Associate Justices.

§ Resigned June 14, 1854.

|| Died July 14, 1854.

¶ Resigned March 7, 1856.

\*\* Sworn in August 11, 1856.

†† Died June 10, 1862.

‡‡ Sworn in September 7, 1862; resigned March 1, 1864.

§§ Died December 20, 1865.



CHIEF.	ASSOCIATES.	DATE.
Charles S. Bradley,*	George A. Brayton, Thomas Durfee, Sylvester G. Shearman,†	1866 to March, 1868.
George A. Brayton,‡	Thomas Durfee, Walter S. Burges, Elisha R. Potter,	March 13, 1868, to 1875. (Elected Jan. 24, 1868.) (Elected Mar. 16, 1868)
Thomas Durfee,	Walter S. Burges,§ Elisha R. Potter,	Jan., 1875, to June, 1881.
Thomas Durfee,	Charles Matteson, John H. Stiness,	(Elected Feb. 11, 1875.) (Elected April 13, 1875.)
Thomas Durfee,	Elisha R. Potter,   Charles Matteson, John H. Stiness,	June, 1881, to 1882.
Thomas Durfee,	Pardon E. Tillinghast, Charles Matteson, John H. Stiness,	(Elected June 2, 1881.) April, 1882, to
	Pardon E. Tillinghast, Geo. M. Carpenter, Jr.	(Elected April 20, 1882.)

\* Elected February 7, 1866, and resigned March 1, 1868. George A. Brayton elected Chief Justice, March 13, 1868.

† Died January 3, 1868.

‡ Resigned May 28, 1874. George H. Browne elected Chief Justice, June 23, 1874, but declined to accept. Thomas Durfee elected Chief Justice, January 28, 1875. April 9, 1875, an act was passed providing for four Associate Justices.

§ Resigned June 1, 1881.

|| Died April 10, 1882.

1886

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